THE BANCA NAZIONALE del LAVORO INVESTIGATION

REPORT OF THE INDEPENDENT COUNSEL

FREDERICK B. LACEY
ON THE PRELIMINARY INVESTIGATION

PART I

DECEMBER 8, 1992

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PART I

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Exhibit 20 Final Report to the Italian Parliamentary Committee on Inquiry.

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Exhibit 21 Transcript from Hearing, dated June 2, 1992, before the Honorable Marvin H. Shoob;

Exhibit 22 Chart 27;

Exhibit 23 Transcript of Hearing, dated March 7, 1991, before the Honorable Marvin H. Shoob;

Exhibit 24 NSD-26 (redacted version);

Exhibit 25 Order, dated October 5, 1992, by the Honorable Marvin H. Shoob;

Exhibit 26 Response of USAO-Atlanta to the allegations raised by the Honorable Marvin H. Shoob; and

Exhibit 27 Transcript of Hearing, dated June 16, 1992, before the Honorable Marvin H. Shoob.

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PART I

INTRODUCTION

This portion of my Report, Part I, references no classified information and thus its distribution is unrestricted. Part II, however, is a classified document and its distribution is restricted.[1]

On October 16, 1992, United States Attorney General William P. Barr appointed me as Independent Counsel pursuant to 28 C.F.R. Part 600, to investigate various issues related to the prosecution of Christopher Drogoul and others in what is referred to as the Banca Nazionale del Lavoro ("BNL") matter.[2] (Letter of Appointment, Ex. 1.)[3]

On October 26, acting under the Letter of Appointment, I recommended to the Attorney General that, pursuant to the Independent Counsel statute, 28 U.S.C. §§ 591, et seq., he commence a "preliminary investigation" into the matter. (Letter of Judge

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[1] Given time constraints, Part II has been classified "Top Secret Codeword" to correspond with the highest classification of some of the restricted material contained in Part II. In my transmittal letter to the Attorney General, I have indicated that review of Part II by trained personnel should continue in order to determine if any portion thereof can be accorded a lesser classification or, perhaps, even be declassified for public distribution.

[2] Use of the description "BNL-Atlanta" is intended to distinguish that branch from the bank's headquarters, which hereinafter will be referred to as "BNL-Rome" or "BNL."

[3] The Attorney General requested that I provide him with my curriculum vitae. A copy is included in this Report. Ex. 2. All exhibits to Part I are designated "Ex." with the appropriate exhibit number to follow. All exhibits to Part II are designated "OIC Ex." with a reference to the appropriate exhibit number. These exhibits are included in the appendices to Reports I and II.

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Frederick B. Lacey ("Lacey") to William P. Barr ("Mr. Barr"), dated October 26, 1992, Ex. 3.)

On October 27, the Attorney General, accepting my recommendation, authorized me to commence the "preliminary investigation," and asked that I report to him thereon by December 8, 1992. (Letter of Mr. Barr to Lacey, dated October 27, 1992, Ex. 4.)

On November 12, I recommended to the Attorney General that he respond to the request of the Committee on the Judiciary of the United States House of Representatives that he seek appointment of a statutory Independent Counsel by stating that he had begun a preliminary investigation under the Independent Counsel statute (Letter from Lacey to Mr. Barr, dated November 12, 1992, Ex. 5). On November 16, the Attorney General made such a response to the Committee on the Judiciary of both the United States House of Representatives (Letter from Mr. Barr to House Judiciary Committee dated November 16, 1992, Ex. 6) and the Senate. (Letter of Mr. Barr to Senate Judiciary Committee, dated November 16, 1992, Ex. 7.)

My appointment as Independent Counsel followed receipt by the Attorney General of letters from Senator Boren and the Senate and House of Representative Judiciary Committees. These letters addressed the conduct by the Department of Justice in the investigation and prosecution of the BNL matter.

In accordance with the terms of the Letter of Appointment, it was to that subject that I have devoted my

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attention during this investigation. To the extent matters may have arisen in my investigation related to the conduct of persons outside the Department of Justice, where I had the time to address them, I have considered them in this Report.

ORGANIZATION AND STAFFING

Honored though I was by the Attorney General's request that I accept the Independent Counsel appointment, I agreed to do so only after receiving his commitment that I would be given access to every document and every person within the Department of Justice. He has fulfilled that commitment.[4] I also withheld my acceptance of the appointment until I had received directly from Judge William S. Sessions, Director of the Federal Bureau of Investigation ("FBI"), his personal assurance that he would assign as many FBI agents as I required in my investigation. This assurance was given and has been met, and the men and women Judge Sessions assigned have worked diligently to complete this assignment. I particularly wish to thank Inspector Deputy Assistant Director Frederick B. Verinder, whom Judge Sessions assigned to coordinate my requirements with the FBI investigative assistance provided.

I also express my appreciation to Director Robert M. Gates of the Central Intelligence Agency ("CIA") and to Inspector General Frederick P. Hitz of that Agency, for their cooperation with me.

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[4] As discussed at 10, infra, and in Part II of this Report, one number of the Department of Justice refused to testify under oath or even give stenographically recorded testimony.

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I also wish to thank United States Senator David L. Boren and Messrs Britt Snyder and George Tenet of the staff of the United States Senate's Select Committee on Intelligence for having given their time to enable me to grasp quickly certain of the key intelligence issues involved in this matter.

Steven Ross, Esq., Counsel to the Clerk of the United States House of Representatives, was also helpful in bringing to my attention certain materials developed by the House Committee on Banking, Finance and Urban Affairs, chaired by Congressman Henry B. Gonzalez.

I had to assemble a staff. To do so quickly, but without sacrificing excellence and dedication, I turned to my law firm, LeBoeuf, Lamb, Leiby & MacRae, drawing from it attorney, paralegal, secretarial and clerical assistance. At various times I have had as many as 25 persons from LeBoeuf working on this matter. Donald J. Greene, LeBoeuf's Chairman, in urging me to undertake this assignment, promised me that the firm would make available to me all the assistance I required. That promise has been kept.

My partners, Charles C. Platt and Molly S. Boast, joined me in this endeavor and, with their professionalism and experience, have played key roles in this investigation. Stuart Alderoty, another LeBoeuf colleague, also played a major role in our work, aided by many others from the LeBoeuf firm.

I also want to acknowledge the dedication and professionalism of Marc W. Farley, an Assistant United States Attorney, who was, at my request, detached from his regular duties

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and assigned to work with me on this project. Mr. Farley also had a central part in this project.[5]

THE SCOPE OF MY INVESTIGATION

Documents

My staff and I have received and reviewed thousands of documents from a variety of sources as part of my investigation. The following describes categories of documents I received and the process of gathering and reviewing those documents.

(a) Public Documents -- At the outset, I received and reviewed many public documents to acquire quickly a broad background of the matter. These documents included: the Report to the Committee on the Judiciary of the House of Representatives by the Attorney General dated August 10, 1992; the Final Italian Parliamentary Committee Report on BNL, dated April 22, 1992 (Ex. 20); the transcript of various proceedings before United States District Judge Marvin H. Shoob involving Christopher Drogoul and others in the BNL matter, including those relating to the entry of Paul Robert Von Wedel's and Christopher Drogoul's guilty pleas and his sentencing hearing; and the media reports regarding the BNL matter.

(b) Documents from the Department of Justice -- I took several steps to obtain all relevant documents from the Justice Department in Washington ("DOJ") and from the U.S. Attorney's

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[5] For a listing of those contributing to the completion of this project, see Ex. 8.

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Office in the Northern District of Georgia ("USAO").[6]

1. I called for and received the files of numerous individuals from the DOJ, USAO and the BNL Task Force at the USAO containing intelligence community information in the BNL matter. These documents have been reviewed for their content, utilized for interviews and the taking of sworn testimony of witnesses, and many are referenced to and included in Part II of this Report, given their classified nature.

2. I met with certain attorneys at the DOJ and the USAO to describe additional documents that I required for my inquiry, and to ensure their full cooperation in providing information. As a result of those meetings, and at my suggestion, Deputy Attorney General George Terwilliger ("Terwilliger") sent a memorandum dated November 3, 1992, to all DOJ employees directing a full and complete search of their files for BNL materials and the production of those materials to FBI agents assigned to this matter and to my staff and me. Terwilliger's memorandum followed and complemented my November 2, 1992, letter to the Attorney General in which I requested 44 separate categories of defined documents and background information on the BNL prosecution from those DOJ, USAO and Task Force persons who have played principal roles in the matter.[7] The document production made in response to my November

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[6] Obviously, both offices are the "Department of Justice." The distinction drawn here is to promote ease of reference to the people in Main Justice in Washington and the U.S. Attorney's Office in Atlanta.

[7] My November 2, 1992, letter to Attorney General Barr is submitted herewith as Exhibit 9.

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2 letter and Terwilliger's November 3 memorandum totaled approximately 70 boxes. Nearly all of these documents have been reviewed by us and computerized by the FBI onto its database. Every effort has been made to retrieve and review the significant information.

3. In addition to the foregoing materials, I have received approximately 30 boxes of documents from DOJ that have been gathered over the last several months for production in response to numerous subpoenas by Congressional Committees reviewing the BNL matter. All of those documents have been organized, reviewed, and analyzed and have been considered by me in preparing this Report.

4. To assure that the foregoing production did not result in any inadvertent omissions, I made frequent requests for specific documents and other information, both formally and informally, from attorneys at the DOJ and the USAO. My November 2 letter is an example of this.

5. I have also obtained and read transcripts of relevant Grand Jury testimony in the BNL prosecution, the several hundred pages of Drogoul de-briefing materials commencing in August 1989, and the various prosecution and status memoranda and drafts of Indictments that preceded the Indictment returned on February 28, 1991. I further directed the USAO to document its handling of the BNL prosecution and to prepare a response to the charges made against the office by Judge Shoob. Special Agent Arthur J. Wade of the Atlanta Task Force was also directed to provide me with a

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document summarizing the BNL investigation as he, as a member of the Task Force, saw it.

(c) Central Intelligence Agency Documents -- Shortly after my appointment I spoke with Director Gates and, thereafter, I met with Mr. Frederick P. Hitz, the Inspector General for the CIA, to outline my requests for documents pertinent to the intelligence issues involved in my investigation. FBI agents, my staff, and I further defined my requests by letter and telephone. After responsive materials were produced by the CIA, FBI agents then interviewed the persons making the production to be sure that a full and complete search for relevant materials had been made. These documents, as well as other information provided by the CIA, have been reviewed and analyzed by my staff and me.

(d) Other Agency Documents -- Requests also were made for relevant documents from the White House (including the National Security Council ("NSC"), the National Security Agency ("NSA"), the Defense Intelligence Agency ("DIA"), the Department of State ("DOS") and the Department of Agriculture ("USDA")). Those agencies have produced documents to the FBI agents, who thereafter carried out interviews to ensure that full and complete searches and document production had been fulfillod. These documents also have been reviewod and analyzed by my staff and me.

(e) Congressional Committee Materials -- I requested permission to review potentially relevant materials gathered by certain Congressional Committees that have investigated the BNL matter. As I have stated, Senator Boren, the Chairman of tha

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Senate's Select Committee on Intelligence, was most cooperative and we were able to review various materials gathered by that Committee. I was denied permission to review non-public documents and other materials in the possession of the House Committee on Banking, Finance, and Urban Affairs; however, Mr. Ross, as mentioned previously, was helpful in other respects.

Interviews and Sworn Testimony

As part of my inquiry into the intelligence information issues raised in my Letter of Appointment, as well as issues relating to the handling of the prosecution itself, we examined the following witnesses, most of them under oath. All of these examinations were transcribed, and, along with Part II of my Report, are classified. Many of these witnesses were also initially interviewed by FBI agents to obtain background information that I thought would be useful in the later stenographically recorded interviews. What follows is a list of those examined:[8]

Department of Justice

-- William P. Barr, Attorney General;

-- Robert S. Mueller III, Assistant Attorney General, Criminal Division;

-- Laurence A. Urgenson, Deputy Assistant Attorney General, Criminal Division;

-- Mark M. Richard, Deputy Assistant Attorney General,

[8] Virtually all of the attorneys in the DOJ and USAO are caresr prosecutors with many years of experiance. I have attached hereto, as collective Ex. 10, the curriculum vitae of each individual who submitted one to me.

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Office of International Affairs;

-- Peter B. Clark, Deputy Chief, Fraud Section, Criminal Division;

-- Nancy J. Brinkac, Trial Attorney, Fraud Section, Criminal Division;

-- F. Dennis Saylor, Special Counsel to the Assistant Attorney General, Criminal Division; and

-- Jerry Rubino, Chief of Security, Department of Justice.

Ellen R. Meltzer, a Senior Trial Counsel in the Fraud Section, Criminal Division, refused to submit to any interview, sworn or unsworn, before a stenographer. I have relied on reports of her interviews by the FBI.

USAO

-- Gerrilyn G. Brill, First Assistant United States Attorney, Criminal Division, and Acting United States Attorney on the BNL prosecution;

-- Gale McKenzie, Assistant United States Attorney, lead prosecutor in the BNL matter;

-- Rimantas Rukstele, former First Assistant United States Attorney and Acting United States Attorney in early 1990; and

-- Randy S. Chartash, Assistant United States Attorney, who assisted Ms. McKenzie.

Members of the USAO submitted to interviews before a stenographer under an agreement whereby each would be permitted to review the transcript and attest to its truth. Ms. Brill and Ms. McKenzie reviewed their transcripts, made certain modifications and attested to the truth of their statements. Mr. Rukstele swore to the truth of his statements under oath. Mr. Chartash reviewed and modified his transcript, but did not attest to its truth.

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USDA

-- Arthur J. Wade, Office of Inspector General, United States Department of Agriculture, a member of the USAO Task Force.[9]

CIA

-- David A. Holmes, Deputy General Counsel;

-- W. George Jameson, Assistant General Counsel, Litigation;

-- Bruce M. Cooper, Attorney;

-- DI#3 [name and position classified];

-- DO#1 [name and position classified];

-- DO#3 [name and position classified]; and

-- DO#6 [name and position classified].

National Security Agency

-- Stewart A. Baker, General Counsel; and

-- J. Lionel Kennedy, Attorney.

Defense Intelligence Agency

-- Robert H. Berry, Jr., General Counsel.

FBI

-- James C. Prier, former Legal Attache, Rome; and

-- Robert R. Peter, former Assistant Legal Attache, Rome.

Drogoul's Attorneys

I endeavored to speak to Jay Strongwater, Esq., whom the Court recently appointed as counsel for Drogoul, and to Sheila Tyler, Esq., who represented Drogoul prior to and during the

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[9] In addition to Mr. Wade, the other members of the Task Force were interviewed.

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plea entry proceedings before Judge Shoob, in the many days of his debriefing following the entry of his guilty plea, and until she was replaced as counsel by Bobby Lee Cook, Esq. Both Mr. Strongwater and Ms. Tyler declined to discuss the case with me. Mr. Cook and I have exchanged telephone calls. Due to time constraints, I was not able to visit with him in his office. We did speak on December 4, 1992, and during that conversation I asked Mr. Cook if he had any documents he wished to share with me. Mr. Cook indicated that he did have some documents at his office and I arranged to have two FBI agents retrieve those documents on December 7, 1992. Those documents have been reviewed.

Other Interviews on the Intelligence Matters

As noted above, FBI agents conducted numerous interviews to ensure that document production was full and complete, and to provide background information from many of the witnesses listed above. Due to the time pressures on my staff and me, I had FBI agents also conduct full interviews of witnesses on various substantive matters, principally on the intelligence information issues referred to in my Letter of Appointment. A list of these interviewed individuals is submitted herewith as Exhibit 11.

Interviews on Other Issues

My staff and I also personally have spoken to, interviewed or deposed under oath, the following people on the handling of the BNL prosecution and related questions:

-- James A. Baker, III, Former Secretary of State and President Bush's Chief of Staff;

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-- Lawrence S. Eagleburger, Assistant Secretary of State;

-- The Honorable Marvin H. Shoob, United States District Judge;

-- Raffaele Montaldi, Italian Magistrate;

-- Giampiero Cantoni (Chairman) and Davido Croff (Managing Director), BNL;

-- Lamberto Dini, Director General of the Bank of Italy;

-- Richard Thornburgh, Former Attorney General; and

-- Nicholas Rostow, Special Assistant to the President, NSC Legal Advisor.

THE REMAINDER OF THE REPORT: PART I

The structure of the remainder of Part I of this Report is as follows:

I. The Beginning of the BNL Matter

II. A Broad Review of the BNL Matter

III. The Indictment

IV. More Details About BNL-Atlanta Wrongdoing

V. The Government's Investigation and Prosecution of the Matter

VI. The Foreign Policy of the United States -- Did It Affect the Government's Investigation and Prosecution?

VII. Issues Raised by Judge Marvin H. Shoob

VIII. Allegations Lodged by Congress and the Press

IX. The Unclassified Cable Story

X. Legal Analysis and Conclusions

I. THE BEGINNING OF THE BNL MATTER

During the last week of July 1989, counsel for two then

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unidentified employees of an unnamed "bank" advised the USAO of certain activity at their institution that, according to the Atlanta Federal Reserve Office, appeared to present a threat to the stability of the world's monetary markets. When the "bank" could not be identified through federal investigative agencies, banking regulatory agencies, or otherwise, the two employee-informants were given non-prosecution agreements and the "bank" was then revealed to be the Atlanta agency of BNL. The employees were Mela Maggi, Assistant Vice President/Money Market Trader charged with funding all of BNL-Atlanta's unauthorized transactions, and Jean Ivey, Assistant Vice President/Lending Officer.

What followed during the next several days is a tribute to the dedication and stamina of the USAO, the Federal Reserve and the federal agents assigned to the matter, as demonstrated in part by the search warrant application (with its supporting affidavits) which, when granted and executed on August 4, 1989, "broke" the case open and exposed a scheme of breathtaking scope and audacity.[10]

As confirmed by Robert Kennedy ("Kennedy") of the Federal Reserve and Lamberto Dini ("Dini"), Director General of the Bank of Italy, on August 3, 1989, at 7:15 a.m. New York time (1:15 p.m. Rome time), Gerald Corrigan ("Corrigan"), President of the Federal Reserve Bank in New York, telephoned Dini to tell him of possible problems at the United States branch of an Italian bank, and that

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[10] The search warrant application (with supporting affidavits) is a model of detail and thoroughness. A copy is included in this Report as Ex. 12.

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officials from the Federal Reserve might be travelling to Rome to meet with him.

On Friday, August 4, 1989, at 2:51 a.m. New York time (8:51 a.m. Rome time), Corrigan called Dini to say that persons from the Federal Reserve would shortly be arriving at the Bank of Italy. At 3:30 p.m. New York time (9:30 p.m. Rome time), three Federal Reserve officials arrived at Dini's office and advised him of the BNL-Atlanta situation. Concern was expressed for the liquidity of BNL and the possible disruption of the New York Interbank Payment System, because they had been advised that BNL-Atlanta had financed very substantial amounts of Iraqi credits with short-term borrowings from other banks. Over that weekend precautions were taken to meet this concern. Dini was told that the FBI and the Federal Reserve would conduct a search of the BNL-Atlanta office that afternoon at about 4:30 p.m. New York time (10:30 p.m. Rome time), after the close of the U.S. financial markets, and it was insisted that he hold this information in confidence until after the search was commenced. It appears that Dini complied with this directive.

After the meeting with the Federal Reserve representatives, Dini called Nerio Nesi ("Nesi") and Giacomo Pedde ("Pedde"), the then Chairman and General Manager of BNL, respectively, requesting that they come to his office at the Bank of Italy at 10:30 p.m. Rome time, the scheduled time of the commencement of the search in Atlanta. Dini, in my meeting with him on November 2, 1992, assured me that he did not tell them at

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this time that the purpose of the meeting was to advise them that BNL-Atlanta was in trouble.[11]

At 4:50 p.m. New York time (10:50 p.m. Rome time), the FBI and the Federal Reserve representatives entered the premises of BNL-Atlanta. Concurrently, Nesi and Pedde arrived at Dini's office where they were to learn of the problems at BNL-Atlanta. Dini believes that the meeting took place sometime after 10:30 p.m. Rome time. Dini, in testifying before the Italian Parliamentary Committee (convened to review the BNL matter), and in conference with me, has stated that he believed that, given their reaction when they heard the news, neither Nesi nor Pedde had prior knowledge of the "wrongful"[12] activities of BNL-Atlanta.

The search validated the informants' information. Within a few weeks, having perceived the vast implications of the apparent wrongdoing, the USAO formed an investigative Task Force consisting of one or more very experienced representatives of the FBI, Federal Reserve, Customs, Department of Agriculture Inspector General and

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[11] I explored this set of facts very carefully because of media allegations that BNL officers in Rome had been "tipped off" to the raid by Dini. I am satisfied that this did not happen. However, if it did, I have seen nothing to indicate that the subsequent investigation was thereby adversely affected.

[12] A word of explanation is necessary. Throughout this Report, I will refer to the scheme involving BNL-Atlanta's concealed lending activities as a "scheme," or "wrongful," or "unauthorized." The fact remains, however, that if these activities were permitted by BNL, a subject I will cover at a later point, then they were not "unauthorized," although in some respects, e.g., false reporting to governmental agencies, they still may have been "wrongful." The term "scheme," of course, may or may not denote criminal activity, depending on the context within which it is used.

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Internal Revenue Service. This strategy was a wise one. From that time on the USAO and this Task Force worked closely[13] throughout the course of the investigation.[14]

II. A BROAD REVIEW OF THE BNL MATTER

BNL, Italy's largest bank, with 424 branches, is headquartered in Rome. At times pertinent to the critical events here, BNL was not a corporation but rather a Public Law Institution founded in Italy in 1913, having a status similar to agency status in the United States. As of July 31, 1989, and during the course of the charged scheme, 96.5 percent of BNL was owned by the Departments and Institutions of the Republic of Italy.

At all pertinent times, BNL-Atlanta was a small branch office, with only 19 employees in August 1989 when the activities central to this matter were discovered. It was chartered by the State of Georgia in March 1982, and its function was to finance large commercial customers. Its deposits were not insured by any governmental entity and its operations were supposedly confined to eleven southeastern states. BNL-Atlanta was under the direction and supervision of BNL's North American Regional office in New York and the headquarters in Rome.

The State of Georgia had primary responsibility for

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[13] See the submission of Arthur J. Wade ("Wade"), Office of Inspector General of the USDA, Task Force member, to Lacey (Ex. 13.)

[14] For the discussion of the government's handling of the investigation after August 4, 1989, see, infra, "The Government's Investigation and Prosecution of the Matter," at Section V.

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licensing, oversight and supervision of BNL-Atlanta. However, the Board of Governors of the Federal Reserve System also had some regulatory control over it and annually examined it, usually in cooperation with the examiners from the Georgia Department of Banking and Finance.

Following the search on August 4, 1989, and prior to the Indictment's return on February 28, 1991, an intensive investigation was conducted by the USAO, its Task Force, the Department of Justice in Washington, and the FBI, into the activities of BNL-Atlanta in connection with over $5.5 billion in loans and letters of credit, made largely to benefit institutions and entities controlled by the Government of Iraq and their borrowers or trading partners. All of these transactions violated BNL's published rules forbidding, in certain cases, the making of any such loans and, in other cases, limiting the amounts and terms of loans permitted to be made.

The investigation revealed that through a variety of means, including forgery, falsification and maintaining a parallel set of secret books and records (the "grey books"), BNL-Atlanta's officers and employees made and accepted loans and letters of credit through that branch. The transactions were not recorded on its regularly maintained books and records, were not reported to BNL's regional or headquarters facilities, and were not disclosed to either BNL's internal or outside auditors, to state regulators,

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or to federal or Italian governmental authorities.[15] These massive transactions and their concealment continued from late 1985 through August 4, 1989, when the search warrant was executed.

III. THE INDICTMENT[16]

The present Indictment was returned February 28, 1991. It named the following defendants:

A. Officers And Employees Of BNL In Atlanta

1. Christopher P. Drogoul ("Drogoul")

Drogoul was First Vice President and manager of BNL-Atlanta from 1985 through August 4, 1989. He was the central figure of the investigation. He had worked for the Atlanta office of Barclays Bank, and then joined BNL's Atlanta agency in 1981 as a loan officer. Drogoul became Acting Manager in April 1984. Presently confined without bail, Drogoul had a residence in Georgia and holds both French and United States citizenship. His father resides in Europe and may have been involved with his son in certain of the unlawful activities here alleged; the USAO has named him a co-conspirator, although not a defendant.[17] The Indictment charges that Drogoul organized and maintained a conspiracy to obtain money fraudulently from BNL, largely for the benefit of the

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[15] See USAO Analysis, Ex. 14 at 20-29. It should be noted that this Exhibit has been refined to conform with Fed.R.Crim.P. 6(e) restrictions and to protect ongoing investigations. See also, Ex. 13 at 10-19.

[16] A copy of the Indictment is submitted herewith as Ex. 15.

[17] Information about the father is set forth in Part II of this Report.

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Iraqi government or government-owned banks and suppliers of goods to Iraqi entities, and that he expanded the schems to include other beneficiaries of secret and unauthorized lending.

2. Thomas M. Fiebelkorn ("Fiebelkorn")

Fiebelkorn was Vice President and Corporate Lending and Business Development Officer at BNL-Atlanta throughout the period of the charged conspiracy. He worked with Citizens and Southern National Bank in Atlanta before joining BNL's Atlanta agency. At BNL-Atlanta he directed and participated in many of the false entries, omissions and technical cover-ups in the conspiracy charged. He is a citizen of the United States. Fiebelkorn pleaded guilty to two Counts of the Indictment and had been awaiting sentence, but has now moved to withdraw his plea.

3. Therese Marcelle Barden ("Barden")

Barden served as Vice President and Operations Officer at BNL-Atlanta after over 30 years of banking exparience in the areas of operations and reporting. She made or supervised the making of many of the false entries, reports and acts of concealment in the conspiracy. She is a Franch citizen with permanent resident status in the United States. She pleaded guilty to two Counts of the Indictment and is awaiting sentence.

4. Leigh Ann New ("New")

New was first hired as a letter of credit clerk at BNL-Atlanta in 1987. In February 1988, she was selected by Drogoul as his secretary and administrative assistant, in which position she played a major role in furthering the conspiracy. She fabricated

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and falsified documents, entries and reports, and sent and received fraudulent wire and written communications. New is a citizen of the United States. Her role put her at the center of communications and concealments in the charged conspiracy. She pleaded guilty to one Count of the Indictment and is awaiting sentence.

5. Amadeo DeCarolis ("DeCarolis")

DeCarolis served as Operations Assistant at BNL-Atlanta, reporting to Barden. He dealt with computer reports and accounting entries, supplying and entering much of the false data provided to BNL's other offices through computer-generated reports and transmissions. He and New also flew to Iraq in early 1989 as part of an attempt to conform BNL-Atlanta's secret "grey books" with the defendant Iraqi bank's records, when BNL-Atlanta's "grey books" could not account for all of the unauthorized loans and letters of credit. DeCarolis is a citizen of the United States, residing in Georgia. He has pleaded guilty to two Counts of the Indictment and is awaiting sentence.

B. Other Defendants

1. Entrade International Ltd. ("Entrade")

Entrade is a New York-based trading company dealing in the international trade of goods and commodities. Entrade is a wholly-owned subsidiary of several other companies, themselves wholly-owned by Enka Holding Investment Company, Inc. ("Enka") of Istanbul, Turkey, a diversified Turkish conglomerate. Entrade obtained unauthorized financing from BNL-Atlenta for exports to

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Iraq and for other purposes, often with United States government export guarantees or insurance. Entrade provided money and things of value for the personal use and benefit of BNL-Atlanta officers and employees in consideration for the unauthorized loans made to finance Entrade's exports to Iraq and elsewhere. Its New York City offices are no longer open. Entrade pleaded guilty to several Counts of the Indictment, was sentenced to a fine of $1 million, and required to make restitution of $5 million.

2. Yavuz Tezeller ("Tezeller")

Tezeller is or was the Executive Vice President of Entrade and Manager of its New York office. He directed Entrade's contacts with BNL-Atlanta, and with other entities in Europe and the Middle East owned by Entrade's parent holding company, Enka. He is a Turkish citizen, is now a fugitive, and is believed to be living in Turkey. He played a key role in bribing both Drogoul and cooperating defendant Paul Robert Von Wedel.

3. Rafidain Bank ("Rafidain")

Rafidain is an Iraqi government-owned commercial bank. It arranged or facilitated trade finance transactions for Iraqi government entities and their non-Iraqi suppliers of goods and services by acting as an originating or issuing bank, or taking the credit risk of funds advanced on behalf of these entities by other banks such as BNL-Atlanta. Thus, Rafidain acted as an originating bank to arrange financing for Iraqi purchases, guaranteed by the USDA through the Commodity Credit Corporation ("CCC"), and for imports by Iraqi government ministries and enterprises. Letters of

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credit originated by Rafidain were then assigned to BNL-Atlanta and concealed on its books from BNL official reports and reports to United States government agencies, including the Federal Reserve System. Rafidain is located in Baghdad, Iraq.

4. Sadik M. Taha ("Taha")

Taha is both the Director General for Agreements and Loans of the Central Bank of Iraq ("CBI") and the Director General per power of attorney for Rafidain. Taha worked for the Baghdad offices of CBI until November 1988, when he moved to England for a heart transplant operation. He then maintained his London base, often travelling to the United States to meet with Drogoul until June 4, 1990, when the London Financial Times reported his possible indictment in Atlanta. His death was reported two days later, but no official confirmation of death has been obtained. Since then there have been reports that he is in Moscow. Taha was or is an Iraqi citizen.

5. Abdul Munim Rasheed ("Rasheed")

Rasheed is the Director General for Investments of Rafidain and for CBI. He is an Iraqi citizen believed to be living in Baghdad, Iraq.

6. Safa Haji J. Al-Habobi ("Al-Habobi")

Al-Habobi holds or held several high positions in the Iraqi government, including Director General of the Al-Nassar Complex of the Iraqi Ministry of Industry and Military Production

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("MIMP");[18] Chairman, President, Director and Vice President of various Iraqi-controlled corporations in England and the United States, including the Matrix-Churchill entities; and Commander in the Iraqi military establishment. Al-Habobi operated both from London and Baghdad as an agent of the Iraqi government and obtained financing from BNL-Atlanta for goods and services to benefit the Iraqi economy and military. Upon learning of the search of BNL's Atlanta offices, he returned to Baghdad. He is an Iraqi citizen.

7. Raja Hassan Ali ("Ali")

Ali is a senior officer of the government of Iraq. He is the Director General of the Economic Department of MIMP. Ali is an Iraqi citizen believed to be living in Baghdad, Iraq.

C. Cooperating Individuals

1. Paul Robert Von Wedel ("Von Wedel")

A former Vice President and Trade Officer at BNL-Atlanta, Von Wedel had extensive banking experience with Citizens and Southern National Bank, Atlanta, in the areas of foreign bank letters of credit, commodity financing and trade finance. He actively participated and assisted Drogoul in managing the conspiracy during its initial stages. Von Wedel, a United States citizen, pleaded guilty to two felony charges, and has actively cooperated with the USAO investigation. He is awaiting sentence.

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[18] The MIMP is also known as the Ministry of Industry and Military Industrialization ("MIMI"). MIMP was created in 1987 by the merger of the Ministry of Industry with the Establishment for Military Production. The new Ministry is headed by Hussein Kamil Hassan, the son-in-law of Saddam Hussein.

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2. Mela Maggi ("Maggi")

Maggi was an Assistant Vice President of BNL-Atlanta in charge of the money desk that provided funds for both official and "grey book" loans. She participated in both the early "in-and-out" transactions, before the "grey books" were adopted, and in the subsequent invention and operation of the "grey books." As has been noted, she and Jean Ivey were the two initial informants on the case and were granted non-prosecution letters in return for their active cooperation.

3. Jean Ivey ("Ivey")

Ivey assisted Maggi in the money desk activity, raising money for unauthorized loans by soliciting telephone and wire deposits or loans from other financial institutions in the amounts requested by other BNL-Atlanta employees and officers. Like Maggi, she has been issued a non-prosecution letter in return for her active cooperation.

D. The Counts

The Indictment charges an overall conspiracy in Count One, related to the substantive charges which follow in Counts Two through Three Hundred Forty Seven. The substantive Counts include charges based upon:

1. Mail and wire fraud

18 U.S.C. §§ 1341, 1343: forming and carrying out a scheme to obtain money and property by false pretenses through unauthorized making of billions of dollars in loans and credits unauthorized by BNL's rules and policies, falsifying books and

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records to conceal the deception, and to defraud the USDA of a CCC export payment guarantee and valid performance bonds.

2. False statements

18 U.S.C. § 1001: making false statements to the Board of Governors of the Federal Reserve System, the United States Treasury, the Export-Import Bank of the United States, and the General Accounting Office in reports to and audits and examinations by those agencies.

3. Fraud on the CCC

15 U.S.C. § 714m: making false statements to the CCC regarding a payment guarantee and eligibility for participation in CCC programs.

4. Interstate transportation of stolen money

18 U.S.C. §2314: interstate transportation of money taken from BNL by fraud and deception.

5. Forgery

18 U.S.C. §493: forging documents purporting to be CCC payment guarantees and Central Bank for Cooperatives ("CoBank") participation certificates.

6. Tax evasion by Drogoul

26 U.S.C. §7201: evasion of individual federal income tax liability for 1987 and 1988 by failing to report or withhold or make estimated tax payments on income from gratuities and kickbacks paid to Drogoul by Entrade.

B. A General Overview Of The Scheme

The Indictment states that the underlying purpose of the

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charged activity was to arrange for billions of dollars in funding for Iraq[19] and other borrowers while misrepresenting to auditors, examiners, the United States and Italian government entities, and BNL-Rome management, that BNL-Atlanta was operating within all applicable lending limits and in accordance with safe and sound banking practices; and to solicit unsecured funding for the MIMP through a London-based procurement network active in the United States and elsewhere. It should be noted that over $1.9 billion of these unauthorized and concealed extensions of credit were for countries (and entities within those countries) other than Iraq.

While the unauthorized "off-book" BNL-Atlanta funding to Iraq began in 1985 as financing for agricultural products under USDA CCC programs and for unsecured freight, it had evolved by early 1988 into totally unsecured credit extensions and agreements (referred to as Medium Term Loan Agreements or "MTLs") totalling $2.155 billion with CBI. These transactions were, in all likelihood, intended for primary use by the MIMP. Only half of this later funding can be traced to specific purchases. The funds from the remaining half of these unsecured credit extensions and agreements were utilized by Iraq to simply transfer cash to a series of CBI clearing accounts, which effectively concealed their final destination and actual usage. It may be fairly assumed that substantial sums thus obtained were disbursed for military or military-related items.

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[19] While contrary to BNL rules, there would be nothing inherently illegal in BNL extending very substantial uncollateralized credits to Iraq during the conspiracy period, had it chosen to do so.

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The USAO's position is that the existence of a unique set of circumstances at BNL-Atlanta made it possible for BNL-Atlanta employees to extend billions of dollars of credit without the knowledge of the management of BNL-Rome or governmental regulatory agencies, as follows: The presence of a "money desk" in the agency made it possible for officials at BNL-Atlanta to borrow money directly and control the sources for that funding; at the time BNL-Rome enjoyed an AAA bond rating from Moody's, a rating extended to only one American bank, which made it possible for the BNL-Atlanta money buyer to utilize various money brokers to borrow hundreds of millions of dollars from the world money markets at or below the London Inter-Bank Offering Rate ("LIBOR") on a daily basis;[20] the complicity to some degree of every employee at BNL-Atlanta, which eliminated any cross-checks by department function within the agency; the turnover of regional managers at critical times; and BNL-Atlanta's conversion from one computer system to another.

Audits conducted by various entities -- BNL itself, BNL's outside auditors, the Georgia State Banking Department and the Federal Reserve all failed to uncover the scheme. A report

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[20] As noted above, Maggi and Ivey operated BNL-Atlanta's "money desk." As the scheme needed money to pay out to Iraqi banks, enterprises or exporters to Iraq, Maggi and Ivey would receive lists of the dates and amounts required. They then telephoned money brokers in the legitimate Interbank Funds ("IBF"), purporting to extend the credit of BNL's "AAA" credit rating. The brokers solicited funds from banks and other financial institutions in the United States and elsewhere by quoting the interest rates and periods-to-maturity offered by Maggi and Ivey. Funds raised were wire-transferred to BNL-Atlanta's holding accounts at Morgan Guaranty Trust Company and ultimately disbursed to Iraqi banks and their exporters through separate wire transfers. (Ex. 13 at 15-17.)

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prepared by the Federal Reserve after the search, however, described the BNL-Atlanta branch as "unsatisfactory based upon the condition of its risk assets, internal controls and management function." (Uniform Report of Examination for Branches and Agencies of Foreign Banking Organizations, with examination data as of August 31, 1989.) Other banking reports were similarly harsh in their criticisms of BNL's audit controls. (See Translation of Report of Minister Carli to the Finance Commission of the Italian Senate on December 14, 1989, at 6 ("The final study now confirms the weaknesses of the Bank's internal structure which permitted such events to unfold.").)

IV. MORE DETAILS ABOUT BNL-ATLANTA WRONGDOING

It should be noted at the outset of this discussion that Drogoul, as Manager and First Vice President of BNL-Atlanta, was specifically limited in his authority to act on BNL's behalf with respect to the types, amounts, terms and borrowers on various types of loans and credits.[21] These rules and procedures included BNL's "signature book," which was also provided to borrowers, including Rafidain and CBI, so they would be fully aware of the limits on the authority of individual BNL officers with whom they dealt. For example, the Iraqis knew that the third and fourth MTLs, signed only by Drogoul and not by a second officer, were therefore violative of BNL rules. Drogoul and the other Atlanta officers and

[21] He had as did other U.S. branch managers, a general power of attorney to act on behalf of BNL. Nonetheless, he and the other branch managers also had to sign a document that their authority was limited by BNL's rules.

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employees were fully aware of these rules and procedures. Relevant limits included the following:

1. Drogoul was personally authorized to make unsecured loans not exceeding $500,000. Loans above that amount required approval in New York or Rome, according to type and size.

2. No loans or credits to Iraq were authorized, unless they were 100% collateralized by cash or cash equivalents. Loans without such collateral were expressly forbidden.

3. Any loan exceeding $500,000 required the signatures of at least two officers of BNL-Atlanta. No single officer was empowered to lend above that limit, or to accept liability above that limit in any form, including issuing or confirming a letter of credit.

4. No loan for over $2,500,000 could be made by BNL-Atlanta, even with two officer signatures, unless further approved by designated officers in New York or Rome.

5. All loans were required to be in writing, and to be accurately entered in and reported on the books and records of BNL-Atlanta and its regular reports to BNL-New York, BNL-Rome, and to federal and state regulators and examiners.

6. BNL-Atlanta was required to maintain its books, records and reports using the bank's standard computer-based accounting system and terminals. It was not authorized to keep separate or parallel books, records or accounts on freestanding computers and/or word processors. A standard set of accounts and reporting formats was prescribed for mandatory use.

In 1985, Drogoul negotiated a $13 million unauthorized assumption of unsecured Iraqi risk for a large grain company. On December 15, 1985, Drogoul also agreed to fund $556 million in

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agricultural commodity purchases by the government of Iraq under the USDA CCC programs for Fiscal Year 1986. Approval was neither sought nor received from Rome before Drogoul signed this $556 million agreement.[22] Thereafter, on April 18, 1986, Drogoul sought approval from Rome to fund $100 million of the $556 million that he had committed. Approval was denied by Rome three days later.

As Drogoul explained in the written statement he he prepared after the August 4, 1989 search for his then counsel, Arnall, Golden & Gregory ("AG&G") of Atlanta, this marked the beginning of BNL- Atlanta's eventual exposure to Rafidain in excess of the limits established by Rome. (Ex. 16.) Drogoul explained the evolution of his scheme in his own words at pages 48-50 of his statement:

> Within two (2) months of signing the Agreement, however, patroleum dropped to USD 9 barrel from its previous level of USD 22 and, in addition, the war between Iraq and Iran intensified. Banks interested in purchasing CCC loans, therefore, began to assess Iraqi risk differently than before, and while they would still purchase the risk, it would be sold at a higher rate than before. Our assessment was that it would cost us in the area of USD 2,500,000 to sell the loans (at prices higher than that which we had committed to the Iraqis).
>
> Hoping that oil would increase in value and that tha intensification of the war was only temporary, we elected to wait and see what would happen. We did not wish to dishonor our commitment to the Iraqis especially since we were exposed to Iraq on the freight finance.

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[22] Neither BNL-Atlanta nor regional management in New York had the authority to extend credit or land BNL's money to other banks without tha specific approval of BNL-Rome. BNL had centralized control of all bank-to-bank lending.

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> Unfortunately the situation did not change and by mid-1986 the branch had transactions to Rafidain Bank recorded on the records of the branch in excess of the USD 100,000,000 limit.
>
> During my visit to Venice, our Regional Manager Mr. Guadagnini was criticized by his superior for allowing the Atlanta Branch to maintain a considerable excess for Rafidain Bank . . . . My regional manager sat down with me there and told me clear up the problem.[23]
>
> Upon my return to Atlanta, Paul [Von Wedel], Therese [Barden], Robert [Post], Mela [Maggi] and I decided that the best way to handle the situation would be to skip the excess amounts off the books on the last day of the month, i.e., on the day the computer reports were examined by Rome.[24]
>
> We continued the process of "skipping" for many months. During the intervening time there was always the risk that Rome or New York would see the true exposure.
>
> As the exposure continued to grow well in excess of the line we always sought ways to sell the "skipped" or soon to become "Grey"

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[23] Indeed, Drogoul was repeatedly warned that formal authorization from Rome was mandatory even for loans guaranteed by the United States Government (i.e., CCC) and that approved credit lines could not be exceeded.

[24] Because of this "skipping" (or "slippage," as it was sometimes referred to by BNL-Atlanta employees), Drogoul felt comfortable in assuring management that his Fiscal Year 1985 $100 million CCC authority had never been exceeded, as follows:

> Total $93,206,495.61 [CCC for Iraq Rafidain]. We wish to point out that these figures have been triple checked by us and that they reflect our outstandings under this facility. The final maturities are accurate. Previous reports, which have required that we reflect manually month by month maturities under each loan, were not accurately reflected. We apologize for this error.

(Telex from Drogoul to Boldrini (BNL-Rome), November 13, 1987, submitted herewith as Ex. 17.) When Drogoul sent this telex he had already exceeded his limit by more than $500 million and signed agreements that exceeded BNL-Atlanta's limit by $1 billion.

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loans.

> Months later the bank converted from one accounting system to another (known as the Mantec System), and two (2) data processing people, one of whom was also an auditor, were sent to Atlanta to assist in the conversion of the records.
>
> As they approached the Rafidain Bank loans, all of which were on the books, it became clear that the total value of these loans would be shortly uncovered if some solution was not found.
>
> Again, Paul, Therese, Robert, Nela and I consulted and realized that the only way to solve this immediate dilemma was to "skip" off the loans permanently. This we did and the "Grey" Book was created.
>
> As we found ourselves with the same dilemma when we were required to lend to the Central Bank of Iraq, the same "Grey" method was employed.

After taking his unauthorized loans completely "off book,"[25] Drogoul signed agreements in January and October 1987 obligating BNL-Atlanta to fund $619 million and $665 million for Iraq's Fiscal Year 1987 and 1988 CCC programs, respectively.[26]

In 1988 and 1989, the Iraqis decided not to have BNL-Atlanta continue to aid in financing CCC-guaranteed transactions. Instead, in those years, Drogoul agreed with the Iraqis to provide

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[25] The "grey book" also was known as the "off-book."

[26] During the course of his unauthorized CCC funding and thereafter, Drogoul also caused BNL-Atlanta to fund over $250 million in unsecured and unauthorized extensions of credit for freight and for the purchase of agricultural products, durable goods and raw materials for which Rafidain was the originating bank. In addition, Drogoul caused BNL-Atlanta to fund another unsecured $70 million for which Rasheed was the originating bank. (Ex. 14 at 12.)

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a total of $2.155 billion in credit extensions under four MTLs. These transactions were purportedly for the purchase by MIMP of, among other things, durable capital goods. As I have noted, there is good reason to believe that many materials used or useful for military purposes were frequently purchased with these funds, which Drogoul came to realize sometime after he had embarked upon the MTL program.

Thus, by way of example, on March 1, 1991, after disclosure that night vision equipment, manufactured by Delft Instruments N.V. ("Delft"), was discovered on captured Iraqi tanks, Delft officials issued a statement advising that the company had in fact exported night-vision equipment to Iraq. The company stated, in part, that an internal investigation had found that their subsidiary, OIP Instrubel, N.V. ("Instrubel"), Oudenaarde, Belgium, had made three shipments of thermal imaging night-vision components, manufactured by Hughes Aircraft Company, Santa Barbara, California, to Iraq and Jordan. Delft further stated that shipments to Iraq were made in December 1989, and April 1990, and the shipment to Jordan took place on December 7, 1990. Delft acknowledged the requirements for U.S. Export Licenses but indicated that no licenses had been obtained.

Review of BNL-Atlanta documents by the USAO revealed that on January 27, 1989, CBI had telexed to BNL-Atlanta a funding request under Option-B (Option-B was a plan agreed to by BNL-Atlanta, CBI and the Iraqi MIMP, wherein a telex would be the only document provided by CBI to initiate a loan). Included in the

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request was funding for Instrubel in the amount of 1,356,000,000 Belgian Francs, which at the time of the transaction was equivalent to $27,777,991. The telex stated that Instrubel would be the supplier of heavy machines and equipment to the Iraqi government establishment for heavy engineering equipment under contract #10.

The USAO tied this transaction to BNL-Atlanta's transfer on March 16, 1989, of United States currency (proceeds of the scheme charged in the Indictment) from its clearing account at Morgan Guaranty Trust Company, New York City, to a CBI clearing account then maintained at Manufacturers Hanover Trust Company, New York City. The amount transferred by BNL-Atlanta was equivalent to the amount requested by CBI in the January 27, 1989, telex after converting the foreign values to United States dollars. The USAO charged Drogoul's use of this CBI account to be money laundering of scheme proceeds in Count 279 of the Indictment.[27]

Further details of Drogoul's activities -- the various transactions, the concealment, his foreign travels, and other conduct in furtherance of the charged conspiracy -- are set forth in the USAO Analysis (Ex. 14), and in its Sentencing Memorandum (Ex. 18) provided to the Court at the time of Drogoul's Sentencing Hearing. I have reviewed records underlying the BNL-Atlanta transactions, the charges prepared by the USAO, the exhibits

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[27] In other documents the USAO revealed that its investigation indicated that Iraq had used some funds from the MTLs for the acquisition of materials readily adaptable to military use. In this connection, it referred to the Iraq military procurement network, in which Matrix-Churchill Corp. ("MCC") and Matrix-Churchill Ltd. ("MCL") played key roles.

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introduced at the Sentencing Hearing, all of the materials reflecting Drogoul's several statements to counsel and his statements during his numerous debriefing sessions, both in 1989 and 1992, in which Drogoul himself admits to these activities.

In any event, there is little if any dispute as to what Drogoul did in terms of the "off-book" and wrongful activities. The principal dispute relates to whether his conduct was authorized by, or was done with the knowledge of, officers of BNL-Rome.

V. THE GOVERNMENT'S INVESTIGATION AND PROSECUTION OF THE MATTER

The USAO and the DOJ have come under fire for having treated BNL-Rome as a victim of the charged conspiracy, having determined that it did not authorize or have knowledge of the charged activities and was not criminally negligent in failing to discover these activities during the period of the conspiracy. Some have made the additional allegation that this prosecution theory reflected the intrusion of political pressure into Justice Department decisions, or a "cover up" of activities somehow authorized by the United States. I have devoted much time and attention to these subjects in my investigation.

A. Overview

As is traditional, this case originated with the USAO, with DOJ later joining in active consideration of the matter. There was minimal contact between DOJ and the USAO until January

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1990.[28] Thereafter, there was interaction between the two offices up to and beyond the return of the Indictment on February 28, 1991. Many factors required DOJ involvement:

1. Procedures requiring DOJ persons to contact the intelligence agencies for intelligence information about BNL;

2. The clearance of immunity requests;

3. The sheer magnitude of the case in dollar terms;

4. The involvement of several federal agencies in the investigation relating to charges ultimately embodied in the Indictment;

5. The necessity for obtaining foreign documents and the testimony of foreign witnesses;

6. The expertise at hand in the Fraud Section of DOJ.

Largely because departing United States Attorney Robert Barr, Jr. ("R. Barr") was pressing for an Indictment before he left office, the USAO in late 1989 had drafted a proposed form. McKenzie, who authored it, successfully opposed presenting it to a Grand Jury at that time. To have filed any Indictment then would have been very unwise. By the end of 1989, it was already obvious that surface had barely been scratched in what was to be a massive investigation in a case of remarkable complexity.

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[28] It appears that the DOJ first contacted the USAO on October 26, 1989, when Robert Mueller, III ("Mueller") called United States Attorney Barr and McKenzie to obtain information on the BNL case. Ten days later Mueller called again, to receive another update. In mid-December, Trial Attorney (Criminal Division) Wolodymyr Sulzynsky travelled to Atlanta at the behest of John Martin, Chief of the Internal Security Section, Criminal Division at DOJ, to discuss the status of the investigation, presumably because of the "national security" overtones. (Routing and Transmittal Slip from Martin to Mark M. Richard and Edward S.G. Dennis, Jr., dated December 26, 1989; Memorandum from Sulzynsky to Martin, dated December 26, 1989.)

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The widespread criticism of the "delay" in returning an Indictment some eighteen months after the search is unfair, and a claim that such a "delay" was attributable to some corrupt motive or political influence, as some have charged, is without support in the record. An experienced prosecutor who reads the massive Indictment will understand immediately the scope of the investigation required just to frame it. The USAO is to be complimented, for my review of the files indicates that the prosecutors only included Counts for which there is abundant supporting evidence.[29] The documentation establishes that the prosecutors determined not to seek the return of an Indictment until they felt they had not just "probable cause," but rather proof of guilt beyond a reasonable doubt.

It is clear that USAO and DOJ spent a considerable amount of time and effort independently and jointly considering whether BNL-Rome was a victim of Drogoul's scheme. To understand the prosecutors' determination, I now turn to the events immediately following the search of BNL-Atlanta.

B. <u>The Initial Stage: Autumn 1989</u>

Drogoul had been on vacation in France when he was informed by Von Wedel of the August 4 search. Drogoul immediately called the Iraqis with whom he had worked on the loan transactions, Safa, Taha and Ali, who instructed him to meet them in London the

[29] The only caveat I raise at this juncture is related to the decision to treat BNL as a victim.

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following day. On August 5, Taha, Ali and others[30] met with Drogoul for several hours and after consulting with officials in Baghdad, directed him to return to Atlanta,[31] although he has stated that he intended to return to the United States in any event. Drogoul travelled to New York on August 7 and met BNL's North American Area Manager, Pietro Lombardi ("Lombardi").[32] While in New York, he also met with an attorney representing BNL, who arranged to retain Lackland of AG&G to represent Drogoul. Later that day, Drogoul returned to Atlanta and was discharged by Umberto D'Addosio ("D'Addosio"), General Vice President of BNL-Rome.[33]

Over the next few weeks, starting August 8, Drogoul met

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[30] The other Iraqis who met with Drogoul included MIMP counsel Fadel Kadhum and Deputy Minister Osama Hammadi.

[31] Drogoul later stated that he realized the Iraqis thought that in this way they would be able to continue to draw on the outstanding Loan Agreement. (Memorandum of Drogoul Interview, dated August 20, 1992.)

[32] Many months later, Drogoul described a "look" that he received from Lombardi the day that they met in New York. Drogoul interpreted the look to mean that "we have been found out," as opposed to one of surprise or blame. (Memorandum of Drogoul Interview, dated June 19, 1992.) Von Wedel recalled that Drogoul once had told him that Lombardi knew about the unapproved transactions. (English translation of the "Final Report, Parliamentary Committee of Inquiry on the case of the Atlanta Branch of the Banca Nazionale del Lavoro and its Connections, Communicated to the Presidency on April 22, 1992" (hereinafter "Italian Parliamentary Report") at 141 submitted herewith as Ex. 20.)

[33] On August 9, officials at BNL-Rome (Vice Chairman Salvatore Paoducci and others) travelled to Baghdad where they met with officers from the Central Bank of Iraq for the purpose, they have said, of confirming the balance of the outstanding loans. (Memorandum from C.W. Carson, Principal Examiner, to P. Vincent Conlon, Deputy Superintendent, Foreign Commercial Bank Division, and P. Philben, Deputy Superintendent and Chief Examiner, Commercial Banks.)

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regularly with officials from BNL-Rome and BNL's attorney, Bruce Kirwan ("Kirwan") of King & Spalding.[34] (Minutes of August 1, 1989 BNL-Atlanta meeting; Minutes of August 14, 1989 BNL-Atlanta meeting; Minutes of August 24, 1989 BNL-Atlanta meeting.) It appears that BNL-Rome representatives also attended all of the meetings at which both USAO and Drogoul were present.

Although R. Barr sought to have the Indictment brought as early as possible, McKenzie recognized that a good deal of investigation was still required and recommended that there be further investigation about various matters, including the "current and potential losses from unauthorized credit transactions under investigation." (Memorandum from McKenzie to R. Barr, dated September 15, 1989.) McKenzie did not suggest in that memorandum that the issue of BNL-Rome's knowledge or complicity be examined.

Nonetheless, she agreed to draft a "bare bones" Indictment that could be filed (and later superseded) in the event Italy attempted to extradite the BNL-Atlanta employees before the USAO was ready to proceed with its own case. (Memorandum from McKenzie to R. Barr, dated September 19, 1989.) She prepared the draft Indictment in October 1989, naming only BNL-Atlanta personnel (Drogoul, Von Wedel, New, Barden and DeCarolis) as defendants, but urged R. Barr not to present the draft Indictment to the Grand Jury

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[34] The minutes of these meetings indicate that they discussed, among other things, the loans that Drogoul had extended, the Rafidain Bank CCC guarantees, and Option A, B and C credit openings. (Minutes of August 14, 1989 BNL-Atlanta meeting; Minutes of August 16, 1989 BNL-Atlanta meeting.) BNL-Rome expressed concern that it would have to honor the enormous commitments Drogoul had undertaken.

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because the Task Force believed the case encompassed "far more than 'regulatory matters.'" (Memorandum from McKenzie to Barr, dated October 31, 1989.)

McKenzie recommended that they await the first week in December, by which time she thought they would be able to present a more comprehensive Indictment containing added counts for (1) false statements to the U.S. Treasury and Export Import Bank ("Eximbank"); (2) a scheme to defraud BNL-Rome; (3) tax counts; (4) Trading with the Enemy Act counts relating to Cuban Sugar; and (5) conspiracy. (Memorandum from McKenzie to Barr, dated October 31, 1989.) R. Barr was adamant that she adhere to that new schedule. (Memorandum from R. Barr to McKenzie, dated November 3, 1989.)

The early Task Force investigation included close to twenty interviews with Drogoul and other BNL-Atlanta employees in which the investigators repeatedly asked them to name anyone, including employees of BNL outside BNL-Atlanta, who might be implicated in the schemes they had employed. Of the other BNL-Atlanta employees identified as targets in the investigation, all contended their actions were for the good of the bank and not for personal gain. Drogoul repeatedly denied the complicity of anyone outside BNL-Atlanta and contended that the loans were good loans, and that there would be no difficulty in getting them repaid.[35]

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[35] Early in the investigation, Drogoul also asserted that the Central Bank of Iraq and the Iraqis had no knowledge that he was exceeding his authority (Memorandum of August 10-11, 1989 Drogoul Interview), statements he later retracted. (Memorandum of July (continued...)

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(Memorandum of August 10, 1989 Drogoul Interview.) The USAO thus terminated the interviews after only a few sessions because they did not think Drogoul's statements were forthcoming.

By the end of October 1989, McKenzie was prepared to recommend that an Indictment include an 18 U.S.C. § 1343 "scheme to defraud BNL because (1) such charges and proof thereof strikes at the heart of the stated defense in this case and (2) such charges allow introduction of substantial dollar losses suffered by BNL to date." (Memorandum from McKenzie to R. Barr, dated October 31, 1989.) She noted that the U.S. Government had not yet suffered any losses (in part because of the extended due dates on the CCC-guaranteed loans to Iraq), but that BNL's losses were extensive.[36] (Memorandum from McKenzie to R. Barr, dated October 31, 1989.)

Throughout the fall of 1989, McKenzie and R. Barr continued to consider new aspects of the case, including the Task Force's investigation of whether Drogoul had operated as a foreign

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[35](...continued)
13, 1992 Drogoul Interview; see also Ex. 19.) In fact, at one point, Drogoul contemplated executing a mutual defense agreement with the Iraqis. (Id.)

[36] BNL had offered significant assistance to the USAO immediately following the August 4 search and met with the Task Force to review documents and reconstruct accounts. BNL had compiled a list of the losses it claimed, which included: (1) absurdly low interest rates; (2) substandard letter of credit fees; (3) an approximate $6 million reserve penalty sought by the Federal Reserve due to BNL-Atlanta's reporting and reserving failures; (4) attorney and accountant fees, travel, lodging, and other moneys; (6) $26 million paid on letters of credit due to financing of Cuban sugar; and (7) 50% discounted worth of Iraqi debt on the world market. (See Memorandum from McKenzie to R. Barr, dated October 31, 1989.)

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agent.[37] (Memorandum from McKenzie to R. Barr, dated November 22, 1989.) McKenzie advised that Entrade should be included as a corporate defendant, but that there was "no evidence that any BNL employee or officer outside Atlanta had knowledge of any portion of the schemes under investigation sufficient to warrant criminal prosecution." (Memorandum from McKenzie to R. Barr, dated November 22, 1989.)

The BNL affair caused consternation among the officers of BNL and Italian politicians. In October 1989, the Chairman and Director General of BNL, Paulo DiVito ("DiVito") visited the American Ambassador in Italy, The Honorable Peter Secchia, and suggested that the matter be raised "to a political level." He expressed BNL's desire to cooperate fully with U.S. government authorities but at the same time made it clear that BNL wanted to achieve some kind of "damage" control. (See e.g. 138 CONG. REC. H8354-8355 (daily ed. September 14, 1992.) It is unclear whether the USAO knew of DiVito's concerns, but McKenzie was obviously aware that the case had sparked substantial interest among high ranking officials at the State Department. According to McKenzie's notes in her "Daily Log," then Secretary of State Baker was most interested in the BNL case and was receiving frequent briefings.[38] (Italian Weekly Report, dated October 10, 1989.)

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[37] McKenzie ultimately decided that she lacked enough evidence to include this charge in the indictment.

[38] In the fall of 1989, as the investigation was unfolding, McKenzie kept daily logs in which she recorded telephone calls, leads and searches conducted by various agents.

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On December 7, 1989, McKenzie wrote to Molly Worlow, Senior Counsel for International Law Enforcement, Department of Justice, and asked that she provide the names of four Iraqi nationals for dissemination to the Intelligence Community. The Iraqis named were Sadik Hasson Taha, Rajaa Ali, Ahmed Al-Dulaimi and Safa Al-Habobi. She also noted that Hussein Kamil Hassan, the son-in-law of Saddam Hussein, might be peripherally involved. (Memorandum from Worlow to McKenzie, dated December 7, 1989.)

Italian Minister Carli, on December 14, delivered to the Finance Commission of the Italian Senate a report he had prepared, which criticized BNL's internal controls and suggested that BNL-Rome had knowledge of at least some of Drogoul's transactions. (Translation of Report of Minister Carli to the Finance Commission of the Italian Senate on December 14, 1989.) McKenzie subsequently forwarded a copy of the report to Gerrilyn Brill ("Brill"), then Chief of the Fraud Division at USAO. (Routing and Transmittal Slip from McKenzie to Brill, dated December 20, 1989.)

C. Interaction Between USAO And DOJ: Winter 1989 - 1990

McKenzie called Deputy Assistant Attorney General Mark M. Richard ("Richard") in early January 1990, to inform him about a planned trip to Turkey and Italy. She intended to travel to Turkey to meet with representatives of Entrade in order to negotiate a guilty plea and to debrief Tezeller, who had offered to cooperate.[39] She also sought to interview BNL-Rome employees in

[39] Richard later requested that McKenzie defer the trip to Turksy until he and others at DOJ could evaluate the efficacy of (continued...)

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Italy. In a letter to Zane Kelly ("Kelly"), Federal Reserve Bank in Atlanta, dated January 9, 1990, R. Barr and McKenzie explained that:

> The stop in Rome is necessary to speak with a number of BNL-Rome employees, officers, and directors at whom Christopher Drogoul and other key subjects have leveled charges of complicity in their BNL-Atlanta scheme. A Rome setting is required for immediate access to all relevant records which may assist in defeating these spurious claims by subjects of our criminal investigation.

(Letter from R. Barr and McKenzie to Kelly, dated January 9, 1990.) It was decided that BNL-Rome officials would come to Atlanta with their documents rather than have U.S. agents go to Rome, and the trip was cancelled.[40] (Memorandum from McKenzie to R. Barr, dated January 18, 1990.) While it is clear that no representatives of either USAO or DOJ ever searched the premises of BNL-Rome, there is no indication that they were precluded from obtaining information that such a search would have disclosed.

On January 26, 1990, McKenzie reported to DOJ on the status of the investigation.[41] At this time, Assistant Attorney

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[39](...continued)
negotiating a guilty plea with Entrade. McKenzie never made the trip, because a plea agreement was reached in this country.

[40] Tezeller later refused to cooperate, so it became unnecessary to make the trip at all.

[41] In the same month, BNL-Rome entered into an agreement with the Iraqis in which it agreed to "fulfill its obligations" regarding the "off-book" credits to Iraq from BNL-Atlanta. This agreement, which became known as the "Geneva Agreement," was critical to BNL because the MTLs originally provided that the Iraqis could defer payment of the principal until a final disbursement was made.

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General Edward Dennis ("Dennis") headed the Criminal Division, and it was arranged for Senior Litigation Attorney Peter Clark ("Clark") of that Division's Fraud Section,[42] another experienced prosecutor, to proceed to Atlanta to review the case and its expanding dimensions with the USAO. As set forth in Clark's memorandum of February 12, 1990, his trip led to additional consideration of certain critical issues in the case, such as whether to approve the plea agreement with Entrade and immunity for Tezeller, and whether the proposed charges would preclude any claims against BNL and underscores again why it would have been folly to seek an Indictment until those issues had been resolved.

At this early stage, there emerged what was to become a major dispute between the USAO and DOJ. As I have stated, the USAO had decided in the Fall of 1989 that it was likely that (1) Drogoul and his Atlanta co-workers had defrauded BNL, making the latter the victim of the fraud; and that (2) BNL had no knowledge of the fraudulent activities and had not authorized them. This view was not unsupported: Drogoul had been interviewed on several occasions beginning only days after the August search and had never claimed authorization of his misconduct by BNL. On tha other hand, he had -- as he was to do later -- wondered aloud how his superiors at BNL's offices in its regional office in New York and at its headquarters in Rome could not have known of his scheme, given its magnitude.

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[42] The Fraud Section was and is headed by Acting Deputy Assistant Attorney General Laurence Urgenson, also an experienced prosecutor.

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Clark was quick to take a view at odds with the USAO. He questioned the quality of the USAO's investigation. He suspected that BNL was knowledgeable of the fraud and might even have authorized Drogoul's activities but noted that the USAO was "very reluctant to charge BNL, primarily because the bank has cooperated fully in the investigation and has questioned the theory under which the Department could charge BNL for the unauthorized acts of its officers and employees." (Memorandum from Clark to Greenberg, dated February 12, 1990.) He, and others in the DOJ Fraud Section, believed that the sheer volume of "grey book" loans to Iraq warranted a more intensive investigation into whether BNL-New York or Rome had authorized, were aware of, or were negligent in failing to detect Drogoul's "off-book" activities.[43] The first reason for this was obvious: should facts show that BNL-Rome were involved, the case would require a different cast than that contemplated by the USAO. Second, it was important to pin down the facts on this issue in anticipation of a defense at trial by the BNL-Atlanta targets that their conduct was authorized by BNL-Rome or BNL-New York. (Memorandum from Clark to Greenberg, dated February 12, 1990.)

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[43] Clark asserted that "the exposure of the United States -- through the CCC financed transactions -- may exceed $1 billion." He also noted that the U.S. Government charge that BNL was defrauded might preclude a U.S. civil action against BNL in the event that Iraq defaulted on its CCC guaranteed loans. (Memorandum from Clark to Greenberg, dated February 12, 1990.) Clark apparently suggested preserving the government's rights against BNL by either including BNL in the indictment or framing the indictment to avoid characterizing BNL as a victim. (Handwritten notes, dated March 13, 1990.)

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In my opinion, the DOJ Fraud Section's advice was not intended to stall or delay return of an Indictment. The advice was sound, the issues raised were significant, and further investigation was clearly required. I note that the responsibility for overall handling of the case and ultimate return of an Indictment remained with the USAO, and that the Atlanta Task Force continued to conduct its investigations under the direction and control of the USAO. The role of the DOJ Criminal Division and its Fraud Section continued to be limited to giving advice and responding to the USAO's requests for information and assistance as required.

On February 23, 1990, the USAO's McKenzie and Rimantas Rukstele ("Rukstele") met in Washington with Urgenson, and together they conferred with representatives from USDA.[44] After this meeting, Urgenson, Rukstele and McKenzie met with Mueller, to update him on the matter.

McKenzie presented to Urgenson a thoughtful memorandum discussing why, in her view, BNL was a victim of Drogoul's fraudulent acts. Her reasons included: (1) the lack of benefit to BNL-Rome; (2) the personal gain that BNL-Atlanta officers had received;[45] (3) BNL's diligent internal controls and audits;[46] (4)

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[44] At the time, USDA considered approving an additional $500 million in CCC guarantees to Iraq.

[45] Indeed, USAO later learned that Drogoul received kickbacks from some of the companies with which he dealt (namely, Entrade), and that the Iraqis enticed him with the promise of a top management position at a banking and trading enterprise to be established in London.

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the fact that the involved officers went to great lengths to conceal their activities; (5) BNL's full cooperation with the investigation; (6) that there was no loss to the U.S. government, nor were any losses anticipated because under the Geneva Agreement entered into in January 1990 by BNL and the Iraqis, Iraq promised to repay most of the CCC-guaranteed portion of its loans in 1990; (7) that BNL was no more culpable than the Federal Reserve, which also was charged with monitoring BNL-Atlanta and also "should have known" about the fraud; and (8) that BNL was an agency of the Italian government, a sovereign nation. (Memorandum from McKenzie to Rukstele, dated February 23, 1990.)

But Urgenson remained unconvinced by the USAO's theory. Given the massive amounts of the "off-book" loans involved and the fact that this lending had stretched over almost four years, it seemed to him unlikely that BNL-Rome would not have known of at least some of these activities. For his part, Rukstele wanted DOJ to be satisfied with the sufficiency of the evidence, and asked that Urgenson visit Atlanta and review the evidence personally.

Accordingly, from March 20 to 22, 1990, Urgenson, Greenberg and Clark met in Atlanta with McKenzie and the Task Force to discuss, among other things, whether BNL-Rome had been remiss in its supervision of the BNL-Atlanta branch. McKenzie continued to

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[46](...continued)
[46] It should be noted that at this time, McKenzie had at least one report in her possession, the Carli Report of December 1989, that severely criticized BNL's internal controls. It is likely that she also had the Federal Reserve Board Report of August 31, 1989, which had been finalized sometime in January. BNL's own investigation resulted in the Petti Report, which similarly concluded that BNL's controls were deficient.

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take the position that BNL-Rome had been diligent in monitoring BNL-Atlanta's performance.

In this connection, Urgenson met with Federal Reserve representatives on March 22 to review the report of the Federal Reserve's August 1989 examination of BNL-Atlanta. The report confirmed that BNL-Rome had been deceived by Drogoul's activities, but it did not support the USAO's determination that the parent bank had been diligent with respect to internal controls.[47] The Federal Reserve suggested that "[a] more aggressive internal audit and control program would have aided in uncovering the unreported and apparently unauthorized transactions" and predicted that a soon-to-be-released examination report from the Bank of Italy would assert that "BNL officials in Rome and around the world were knowledgeable of and participated in [the] transactions." (Uniform Report of Examination for Branches and Agencies of Foreign Banking Organizations, with examination data as of August 31, 1989.)

The meetings in Atlanta caused Urgenson to defer the return of a proposed Indictment until further investigation was conducted.[48] Urgenson requested that the USAO submit a prosecution

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[47] The Federal Reserve found that "BNL lacked any credible controls and procedures that would limit and monitor the activities of its branches" and that "supervision of [the Atlanta] Agency by [the] parent bank's head office and North American management in New York was unsatisfactory and ineffective." (Uniform Report of Examination for Branches and Agencies of Foreign Banking Organizations, with examination data as of August 31, 1989.)

[48] Among other things, Urgenson suggested that, at some point, the USAO should "lock in" testimony of important witnesses by calling them before the Grand Jury.

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memorandum -- a routine practice in complex cases -- on the factual and legal issues involved in the proposed prosecution. USAO and DOJ agreed that the case against certain Iraqis was strong enough to warrant including them in an Indictment.

These foregoing steps were discussed with Rukstele, and he agreed that they should be undertaken. Again, I do not think that there was a plan to delay or suppress a prosecution. Certainly there is not one paper, nor any testimonial evidence, supporting such a supposition. Indeed, my own experience teaches that the decision to defer an Indictment at this point continued to be the right one.

D. The Reaction In Italy

During the month of March 1990, officials of BNL-Rome apparently grew apprehensive that USAO's view of BNL as a victim would not prevail. They thus embarked upon a strategy to persuade officials in the U.S. government that it was inadvisable to indict BNL.[49]

On March 6, Prime Minister Andreotti apparently met with then U.S. Attorney General Richard M. Thornburgh ("Thornburgh") to discuss a broad range of issues relating to Italy and the United States. At the end of a lengthy memorandum briefing Thornburgh in advance of that meeting, Dennis summarily reviewed the status of

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[49] BNL-Rome reprssentatives noted that it was evident that the strategy of cooperating with the prosecutor was "losing its weight" and that instead they should exploit "access to high political levels." (Italian Weekly Report, entry dated March 23, 1990.)

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the BNL investigation.

Two weeks later, at a White House social occasion, Italian Ambassador Petrignani apparently told Thornburgh that an Indictment of BNL would "add insult to injury" and would not be "understood" in Italy, because BNL was an organ of the Italian government.[50] (Italian Weekly Report, entry dated March 21, 1990.) Thornburgh has no recall of any such discussion, and in any case, rejects the suggestion that anyone in the Administration ever approached him to influence in any way the conduct of criminal investigations.[51] (Deposition of Richard M. Thornburgh, December 3, 1992, at 13-14.)

On March 30, 1990, the Bank of Italy concluded its investigative report and sent it to the Federal Reserve in New York. The report was consistent with the Federal Reserve's findings on the inadequacy of BNL's controls and referred to "the possibility that BNL's top management and Head Office may have known of the Atlanta branch's irregular operations," but it did not fulfill the Federal Reserve's prediction that the report would

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[50] On March 17, Petrignani also met with Dennis, Richard and Robin Ross, Chief of Staff of the Attorney General's Office, presumably to discuss the BNL matter.

[51] Attorney General William P. Barr also stated that from the period beginning in May, 1990 (when he became Acting Deputy Attorney General) and thereafter, no person from any U.S. government department or agency outside the DOJ suggested or instructed him to handle the BNL investigation in an inappropriate way, to delay the process or to shield any individual or entity from investigation. (Deposition of Attorney General Barr, December 2, 1992, at 19.) Mr. Barr also said that he never suggested to Mueller that the case be handled in any inappropriate way. (Id. at 20.)

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implicate BNL-Rome officials. The Bank of Italy report concluded that while managers outside Atlanta had not executed the scheme, the unauthorized loans were made "within an organizational framework of structurally inadequate controls on the activities of the North American branches," and that, in particular, "the procedures for monitoring the account books, which was the responsibility of [an] internal auditor. . . were inadequate." (Translation of Banca d'Italia Report on BNL-Atlanta, undated (conveyed with March 30, 1990 letter).)

E. The Prosecution Memorandum: Spring 1990

In response to DOJ's request, McKenzie and Rukstele drafted a comprehensive Prosecution Memorandum that was delivered to DOJ in late April, 1990. The Memorandum evidenced McKenzie's intent to prosecute the five previously named BNL-Atlanta defendants -- Drogoul, Fiebelkorn, Barden, DeCarolis, and New -- as well as Pierre Drogoul,[52] Entrade and its employee Tezeller, and the following six Iraqis: Taha, Ali, Toma,[53] Rasheed, Al-Dulaimi,[54] and Al-Habobi. It made no mention of prosecuting

[52] Christopher Drogoul's father, Pierre Drogoul, was identified as instrumental in facilitating kickbacks from Entrade to Drogoul and Von Wedel, and as having an interest in, or an executive position with, some of the companies receiving "off-book" funding from BNL-Atlanta. (April Pros. Memorandum at 8.) Pierre Drogoul's name was brought up occasionally by the prosecutors as a possible defendant, but he was not included in the final indictment.

[53] Abdulahad Petraus Tome was a CBI official who co-signed with Raja Hassan Ali for the third MTL for $500 million.

[54] Ahmed Al-Dulaimi was, at the time, the Under Secretary of the Iraqi MIMP.

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Rafidain Bank, which was ultimately included in the Indictment, CBI, or BNL-Rome. It referred briefly to Wafai Dajani, a Jordanian businessman, but did not expound upon his role in the illegal transactions.[55] It also did not mention Matrix Churchill Corporation ("MCC"),[56] because the prosecution had decided that examination of the consulting fees paid to MCC were part of the investigation's "second phase," and that any charges relating to it would not be included in the initial Indictment. (April Pros. Memorandum at 50.)

In the April 1990 Prosecution Memorandum, McKenzie set forth some of her reasons for not including BNL-Rome among the proposed defendants. Noting that "Federal Reserve Examiners who have become totally familiar with all aspects of the BNL-Atlanta illegal operation since detection cannot, in retrospect, assure that even a full Federal Reserve Examination would have detected the scheme," (April Pros. Memorandum at 84), she reasoned that the work product of the several internal and external auditors would make it very difficult to prove BNL's culpability under the law.

McKenzie also emphasized the policy reasons favoring the BNL "victim" theory: that the defendants would receive higher

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[55] The April 1990 Prosecution Memorandum also discussed the second phase of the investigation, in which McKenzie contemplated charging entirely different defendants with additional Counts.

[56] MCC, based in Ohio and a subsidiary of U.K.-based Matrix-Churchill Ltd., was part of the Iraqi arms procurement network and acted as a paid consultant or broker while finding U.S. contractors to construct industrial plants in Iraq. (See e.g., U.S. Treasury/UCSC Investigation Report dated February 12, 1990 (Interview of Von Wedel).) BNL-Atlanta apparently provided financing for the plans pursuant to the MTLs. (Id.)

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sentences under the Federal Sentencing Guidelines if BNL were treated as a victim; and that otherwise, the roles of Tezeller, Entrade and the Iraqis would be ignored because the only misconduct uncovered in the investigation was their participation in the fraud against BNL. (April Pros. Memorandum at 94-95.)

The Memorandum also discussed at length the Iraqis' complicity in tha lending scheme. As evidence both of their complicity, and as further evidence that BNL-Rome was a victim, the Memorandum pointed to the efforts of Drogoul and the Iraqis to hide the scheme from BNL-Rome. It cited as an example the meeting between Drogoul, Von Wedel and Teodoro Monaco, a BNL-Rome representative, in Baghdad. Drogoul had suggested that Monaco and Rasheed meet "in an effort to reopen contact between the Iraqis and BNL." Rasheed, who was heavily involved in transactions with Drogoul, purportedly lamented the fact that BNL did not engage in any lending to Iraq without full collateralization. (April Pros. Memorandum at 47-48.)

Notwithstanding the very substantial effort the April 1990 Prosecution Memorandum reflected, the Fraud Section personnel in DOJ still were not convinced of BNL-Rome's status as a victim.[57] The sheer size and number of the "off-book" transactions, and BNL-Atlanta's need to deal with international money brokers to borrow funds for these transactions continued to leave Urgenson and Clark concerned that an Indictment on the "BNL as victim" theory would

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[57] Although Urgenson apparently was not certain that BNL-Rome was truly a victim, he did concede that such an analysis might ultimately prove correct.

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fail at trial.

Urgenson and Clark also were concerned that the defendants might assert they had engaged in the scheme to improve the profitability of BNL-Atlanta -- and of BNL as a whole -- by making a much larger number and volume of loans than could be done under BNL's official guidelines. If the defendants could point to early indications of unauthorized lending that arguably should have been detected by BNL's senior management, they could claim that BNL's failure to halt the scheme evidenced authorization. Urgenson also thought that, in light of the fact that BNL was owned by the Italian government, the defense might assert that the "off-book" lending scheme had been designed by the Italian government to maintain economic relations with Iraq.

The USAO, however, responded by noting that Drogoul still had not named anyone at BNL-Rome who had authorized what he had done, and that the "off-book" transactions by BNL-Atlanta were so structured that suspicions would not have been aroused. They also contended that the losses on the "grey book" lending were so large and so predictable that no bank would have taken the risk, particularly given Iraq's bad credit rating and the small interest rate spreads and minimal fees involved in the lending.

In the end, DOJ and the USAO could not come to terms with one another, and the DOJ attorneys suggested that a revised Indictment be drafted by the USAO. They also suggested that the USAO theory that the "off-book" loans were not profitable be investigated more thoroughly, and that Drogoul's superiors in BNL-

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New York and Rome be called before the Grand Jury. In light of the very different views held by these two groups of career prosecutors, and their conflicting theories about the evidence gathered to date, it would have been unsound to have sought an Indictment at that point.

F. The Investigation: Spring and Summer 1990

In the late Spring, as the Task Force in Atlanta continued to develop and pursue leads in its investigation, Clark continued to question the progress of the investigation. He understood that only one witness had testified before the Grand Jury, even though he and Urgenson had urged earlier that the witnesses be put before the Grand Jury to lock in their testimony. He also understood that the USAO had not interviewed any of BNL's internal auditors. (Memorandum from Clark to Greenberg and Urgenson, dated May 9, 1990.) Clark believed that pursuit of these leads would affect the USAO's analysis of whether individuals in other BNL offices knew, or should have known, about the scheme. His position, of course, reflected DOJ's long-held skepticism about the USAO theory.

In May 1990, representatives from the DOJ and the Task Force, including Richard, Urgenson, Rukstele, McKenzie and Wade, met with State Department and NSC officials, including Nicholas Rostow, Special Assistant to the President and Legal Advisor, NSC. The purpose of the meeting was to keep the Intelligence Community informed of the status of the BNL case. (Partial Attendance List of White House Meeting, dated May 29, 1990.)

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During the Summer of 1990, McKenzie was drawn from the case to focus on the retrial of another case she had been handling. The Task Force continued its investigation, drawing intermittently on McKenzie's advice and assistance. In early July, Rukstele provided Richard and Urgenson with a written status report, in which he noted that USAO had agreed to prepare another draft Indictment and a Prosecution Memorandum.

G. The Continuing Debate: Autumn 1990

In September 1990, Italian Ambassador Petrignani renewed his efforts to convince DOJ and the Atlanta investigators that BNL-Rome was not culpable. On September 21, several representatives from DOJ and the Task Force, including Urgenson, McKenzie and Wade, met with the Ambassador, Senator Carta (chairman of the Italian Senate Committee investigation) and Professor Zanelli (counsel to the Italian Committee). Petrignani is reported to have asserted that "BNL was the victim of a terrible fraud" and that the "reputation of BNL was of great importance as the Italian State is a majority owner." (Memorandum from Daniel Lippman, Office of International Affairs ("OIA"), to Drew Arens and Richard Owens, dated September 21, 1990.)

On October 8, Greenberg prepared a letter to CIA General Counsel W. George Jameson ("Jameson"), requesting that the CIA search for information regarding the CIA's relationships with certain individuals and entities and whether BNL funds were used directly or indirectly for the purchase of implements of war or dual use items that could be used in the manufacture of implements

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of war. (Letter from Greenberg to Jameson, dated October 8, 1990.)

In addition, the controversy between USAO and DOJ about the USAO's prosecution theory intensified. In early October, representatives of DOJ and the USAO investigative team, including Mueller, Richard, Urgenson, Greenberg, Clark, McKenzie and Paul B. Maloney ("Maloney"), held a meeting to discuss, among other things, whether BNL had benefitted from the lending transactions to Iraq, a point which was fundamental to the USAO prosecution theory. (Handwritten notes of October 2, 1990 meeting.)

In fact, it appears that early on the "off-book" and "skipped" loans were quite profitable.[50] For example, in 1988, the Chicago and Los Angeles agencies of BNL earned approximately $250,000 and $600,000, respectively, while Atlanta netted $3 million. (Ex. 16 at 54.) Thus, if the loans had been paid on schedule, "the scheme could have drastically raised BNL's profitability." (Memorandum from Clark to Urgenson, dated December 1, 1990.) This could have provided a feasible theory to charge BNL's officers as well as the bank itself.

The USAO also sent a new draft Indictment to DOJ in October. This extensive draft charged the five BNL-Atlanta employees; Tezeller and Entrade; Taha, Rasheed, Ali and Al-Habobi; and CBI and Rafidain Bank. The cover letter conveyed the USAO's expectation of including two additional Iraqi individuals in the

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[50] Italy imposes capital limits and credit standards on banks, which limit the number, type and length of loans that a bank can lawfully make. (January 1990 Pros. Memorandum at 63.)

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forthcoming Prosecution Memorandum, neither of whom was ever added.[59]

Thereafter, Clark and Taylor went to Atlanta and reviewed documents. Clearly, a principal concern of both offices at this point was putting to rest any remaining doubts about BNL's status as a victim of the fraud. The care with which these tasks were designed and performed is evident in the lengthy October Prosecution Memorandum I have reviewed. It carefully established the point that to hold the corporation criminally liable for illegal acts of its employees, there must be an intent to benefit the corporation. The Memorandum also analyzed the sovereign immunity issues involved, because it was recognized that the two banks it was proposed to indict, CBI and Rafidain Bank, would likely be considered agencies of Iraq.

With both DOJ and the USAO determined to put to rest the question whether BNL-Rome had been defrauded, Clark reviewed the October Prosecution Memorandum to focus on those features that, in his view, undermined the theory. Clark listed the following factors:

> (1) BNL-Rome was on actual notice of repeated violations by BNL-Atlanta, but did not follow through as would be expected; (2) BNL Corporate should have detected the violations in other ways, particularly from the vary active money desk; (3) the sources, extent, enforcement and terms of BNL's prohibition on

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[59] The letter also noted that they expected to obtain the cooperation of Gordon Cooper, Vice President and Chief Executive Officer of MCC, in providing evidence against the Iraqis. The prosecutors obtained formal use immunity for Cooper, in exchange for his complete cooperation.

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> various acts engaged in by BNL-Atlanta was not given; (4) it would have been highly unlikely for BNL-Atlanta to control all three areas of lending, funding (money desk) and internal audit; and (5) the scheme could have drastically raised BNL's profitability if the loans themselves were repaid on schedule or BNL may have been able to build its book of earning loans without holding the required capital required by Italian law.

(Memorandum from Clark to Files, dated November 1990.)

In part, his comments appeared to stem from his examination of certain Federal Reserve documents, in which he discovered information and leads that were new to him, and which raised still further questions about the knowledge and involvement of BNL management outside Atlanta.[60] His review of the documents also led him to conclude that there were still significant leads that needed to be pursued, specifically regarding the internal auditors and their reports,[61] Guadagnini's relation to Drogoul, and Guadagnini's position at Entrade.[62] In effect, as Clark pored

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[60] He was particularly troubled because he believed that USAO had not given him all of the pertinent documents.

[61] One of the documents Clark read memorialized the Federal Reserve's review of the auditors' workpapers for the 1988 and 1989 BNL-Atlanta audits. These materials revealed that the BNL auditors had uncovered a "serious lack of controls and segregation of duties and evidence of substantial mismanagement. (Memorandum from Clark to Urgenson, dated November 13, 1990, citing Memorandum from Kennedy to Kelley, dated October 16, 1989.) Clark apparently was surprised because he thought that the Task Force had reviewed all of the internal and outside auditors' reports and found them satisfactory, as the USAO had indicated in its April Prosecution Memorandum.

[62] Clark also learned from the Federal Reserve documents that Maggi, one of the BNL-Atlanta informants, had stated that Drogoul had attributed the practice of taking loans off of the books to

(continued...)

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through the Federal Reserve documents, it is possible that he was discovering what Drogoul had referred to, in his statement to his lawyers later made available to USAO, as "telltale signs" that were all over the branch and in its records.[63] (Ex. 16 at 55.)

Upon reviewing this new information, Clark also began to doubt whether BNL-Rome officials had cooperated fully with the Task Force, as McKenzie had insisted.[64] He noted that New York Federal Reserve Examiner Walter Zunic had asserted that early on, BNL refused to permit McKenzie to interview Monaco, Alvisa and Florio. (Memorandum from Clark to Urgenson, dated November 13, 1990.) In fact, two of the interviews actually took place, but Clark's point was valid: it appeared to him that BNL-Rome selectively offered cooperation.

In the meantime, the officers at BNL-Rome continued to assert their ignorance of the scheme. In the presence of McKenzie,

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[62](...continued)
Guadagnini. With the information I have available today, it appears to me that Maggi misinterpreted a comment made by Guadagnini to Drogoul. I can appreciate that at the time, Clark might have found this information startling. Clark also learned that after Guadagnini's retirement from BNL, Guadagnini became a Director at Entrade. (Memorandum from Clark to Urgenson and Greenberg, dated November 13, 1990; Ex. 14 at 49-50.)

[63] For example, Maggi had stated that the "grey book" letters of credit were coded with a "2" prefix, which Clark believed raised the question of "why BNL's auditors -- or the examiners -- did not detect such an obvious signal to BNL auditors." (Memorandum from Clark to Urgenson and Greenberg, dated November 13, 1990; Ex. 16 at 55.)

[64] Urgenson previously had commented that "BNL's presentations to American and Italian investigators have been marked by 'manipulation and self-protection' on the part of BNL, and their conduct was 'not as good as they think.'" (Memorandum from Urgenson to file, dated May 2, 1990.)

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BNL's attorneys interviewed Pedde by telephone at his home in Italy. Pedde not only denied knowledge of the scheme but asserted "that there was absolutely no truth to the unsubstantiated rumor that the BNL-Atlanta scheme was set up by BNL-Rome to fund the Italian Socialist Party."[65] (Memorandum of November 20, 1990 Pedde Interview.)

In spite of the repeated assurances by BNL officials, Urgenson was "not yet convinced . . . that BNL was an unwitting victim, and that there was no involvement, authorization or condonation of the illicit activity by BNL personnel outside the Atlanta Agency . . .." (Memorandum from Urgenson to Maloney, dated November 29, 1990; see also Memorandum from Urgenson to Mueller, dated November 30, 1990.) Before approving Atlanta's prosecution theory, Urgenson wished to be completely assured that each investigative lead pointing to an involvement of BNL management outside Atlanta had been pursued, and that the USAO prosecutive theory would stick.

Urgenson noted that part of the difficulty they were experiencing in this regard was "the virtual absence of any hard probing of BNL New York or Rome personnel . . .." (Memorandum from

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[65] The U.S. Treasury attache in Rome previously had suggested that the profits from the BNL-Atlanta agency's extensions of credit had been "earmarked for the Italian Socialist Party in accordance with an apparently 'institutionalized' practice of illicit political financing derived from the division of stewardship of the various publicly-owned [Italian] institutions between various political parties." (Memorandum from Clark to Urgenson and Greenberg, dated November 13, 1990, citing New York Federal Reserve Memorandum from Dacey to Spindler, dated October 16, 1989.)

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Urgenson to Maloney, dated November 29, 1990.) He decided, therefore, to send Clark and Taylor to Atlanta to continue to review documents and investigate still further the evidence upon which USAO rested its theory. Clark and Taylor acknowledged that their trip to Atlanta, and corresponding analysis of the investigation, came "at a time when it is uncertain whether a state of war will soon exist with Iraq, [which] will without question subject the Department to the highest degree of scrutiny by the national and international media and by the Congress. The Department's decision making process will be as open for comment as our conduct before and during trial." (Memorandum from Clark and Taylor to Urgenson, dated December 1, 1990.)

N. The Final Stage: January and February 1991

On January 3, 1991, members of an Italian investigative delegation travelled to Atlanta and met with Lippman, McKenzie, Wade and Clark, among others.[66] (Memorandum from Lippman to Arena, dated January 7, 1991.) Professor Enrico Zanelli, a member of the delegation, asserted that while the Italian Committee had no evidence that anyone at BNL was involved in the unauthorized loans, BNL officials in Rome and New York may have been negligent.

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[66] This meeting had been planned in mid-October, when Urgenson received word that McKenzie wished to meet with Dr. Montaldi, of the Tribunal of Rome. McKenzie is reported to have been anxious to assist Montaldi, but noted that the case had proven far more complex and in some respects considerably different than it had originally appeared. (Undated Letter from Worlow to Al Dott Raffaele Palmieri, "Direttore, Ufficio II A.P., Ministero di Grazia e Guistizia".) According to Worlow, McKenzie believed that Dr. Montaldi's request to meet was "based on certain understandings about what transpired in Atlanta that have now proven to be incorrect . . . " (Id.)

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(Memorandum from Lippman to Arena, dated January 7, 1991.) Carta expressed skepticism that only BNL-Atlanta was involved in the scheme. (Id.) It does not appear that the Italians' opinions, however, influenced McKenzie's adherence to the "Rome as victim" theory of an Indictment.

A week later, on January 11, 1991, Brill, McKenzie, Rukstele, Alexander and Wade held a meeting with Urgenson, Clark and Taylor, at which the USAO again sought to persuade DOJ that BNL-Rome should be treated as an unwitting victim. The USAO reiterated its position that the fraud theory rested upon the clandestine nature of the transactions, the personal gains to Von Wedel and Drogoul, and the likely effect of harm to BNL-Rome. (Memorandum of Outline of Fraud Section meeting, dated January 11, 1991.) The USAO prosecutors believed that proceeding with this theory would permit them to pursue the prosecution of other critical entities such as the Iraqis, Entrade and Dajani. (Id.) In addition, they indicated that the theory made sense in the context of the government's "national security concerns"[67] and the concerns of the public and Congress that an Indictment in the case was long overdue. (Id.)

Clark was not convinced. Once again, he directed his comments to the adequacy of the proof. He observed that the facts "provide a less than adequate basis upon which to prove the

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[67] By early January, President Bush had successfully built a coalition against Iraq that included both Italy and Jordan, and the U.S. threatened to invade Iraq if it did not retreat from Kuwait by January 15, 1991.

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requisite intent on the part of the Iraqis and the lower-level BNL personnel and put into question whether the evidence against Drogoul is sufficient to show that, with the exception of the Entrade transaction, he intended to defraud his employer." (Memorandum from Clark to Urgenson, dated January 11, 1991.)

Three days later, Mueller assigned Clark to rewrite the Prosecution Memorandum and the draft Indictment. On January 25, Clark travelled to Atlanta to help the prosecutors investigate the extent of knowledge held by BNL officials outside of Atlanta and to put major BNL witnesses before the Grand Jury.[46] Clark sat in the Grand Jury room and then a week later, reported to Urgenson that USAO had achieved the "primary objective" of locking in Drogoul's superiors' testimony that they had not authorized Drogoul's transactions with Iraq. (Memorandum from Clark to Urgenson, dated January 31, 1991.) Clark also said that the adequacy of BNL's management and auditing controls had been explained sufficiently to preclude criminal liability of BNL-Rome. (Memorandum from Clark to Urgenson, dated January 31, 1991.)

The following day, however, Clark's doubts were rekindled when he learned of an article that had been published on February

[46] McKenzie had requested of BNL's counsel that the following former BNL officers voluntarily testify before the Grand Jury: Pedde, Nesi, D'Addosio, DiVito, Constantini, Bonamici, Florio, Monaco, Lombardi, Messere and a member of BNL's Board of Directors and Executive Committee. (Letter from McKenzie to Walter Driver, Jr. and Kirwan, dated January 20, 1991.)

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20, 1988 in Middle East Economic Digest ("MEED").[69] The article indicated that BNL-Atlanta had charged the Iraqis a very generous rate for financing import transactions -- just 1/16 percent above LIBOR -- and that BNL had been left highly exposed to Iraqi risk. Moreover, it asserted that BNL had agreed to continue to provide financing to Iraq.[70] Clark wondered whether the article, then almost three years old, should have alerted individuals at BNL to the Atlanta scheme. He noted that "no systematic effort has been made to determine who at BNL-Rome was aware of the article."[71] (Memorandum from Clark to Files, dated February 1, 1991.)

On January 28, Urgenson sent to Mueller an extensive Prosecution Memorandum presenting the Fraud Section's analysis of the USAO's draft Indictment. The Fraud Section redrafted the Indictment to shorten and reorganize it, but proposed the same list of defendants as the USAO had proposed: the five BNL-Atlanta employees, Entrade and Tezeller, the Central Bank of Iraq and Rafidain Bank, and four Iraqi individuals, including Al-Habobi, the Chief Executive Officer of both MCC and Matrix Churchill, Ltd. The

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[69] It is of interest that the first of the Iraqi/BNL-Atlanta MTL Agreements was executed on February 22, 1988.

[70] Notably, the MEED article discussed BNL financing only in the context of CCC guarantees, and not in the context of the MTLs or other loans.

[71] A few days later, Clark asked DiVito whether he had known or heard about the article from employees at other banks. DiVito denied knowing anything about the MEED article, noting that early in 1988, BNL was in the midst of "great retrenchment" which may have resulted in BNL's "cutting itself off from routine exchanges with officers at other banks." (Memorandum from Clark to Files, dated February 5, 1991.)

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Indictment as reworked by the Fraud Section represented a considerable organizational improvement, but I find nothing to suggest that the Fraud Section's redraft was intended to exert any influence on the USAO's judgments about who should be named.

The January 1991 Prosecution Memorandum reflected continued consideration of MCC and MCL. It also questioned, as had the USAO, the ability to obtain jurisdiction over the two Iraqi banks, but concluded, as had the USAO, that there was no insurmountable "sovereign immunity" hurdle to pursuing their Indictment. (January Pros. Memorandum at 55). The Prosecution Memorandum also considered the basis on which defendants might rest a defense that the conduct was authorized.[72] (January Pros. Memorandum at 59ff.) Obviously, however, the prospact of this defense was no longer an obstacle to indictment based on the USAO prosecution theory, because the DOJ, having heard the Italian witnesses before the Grand Jury, at last was prepared to endorse an Indictment that did not include BNL.

I. The Final Indictment

The days immediately prior to the return of the final Indictment saw a fluid list of defendants. At one point, according to McKenzie, Clark proposed preparation of a draft "global" Indictment that included everyone the USAO had considered, even

[72] The defense could be based on: (1) BNL-Rome's failure to stop the scheme upon early indications of "off-book" loans and borrowings; (2) the Geneva Agreement between BNL-Rome and Iraq (supporting a claim of prior authorization); and (3) BNL's failure to follow up on the unsecured loans Guadagnini had detected.

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those against whom there was insufficient evidence to indict. The list grew to include Wafai Dajani and the MIMP, but they were removed as defendants a few days later at a February 13 meeting of McKenzie, Alexander, Brill, Clark, Urgenson and Mueller.[73] At the February 13 meeting, the possibility of dropping the Central Bank of Iraq was discussed but not decided. (Memorandum from Brill to File, dated February 14, 1991.) It is important to remember that by now, the United States was at war with Iraq. Brill noted that the State Department did not want CBI indicted, while the USAO still did.

Mueller subsequently asked the Departments of Treasury, Defense and State, Eximbank, and the Federal Reserve for their views on indicting CBI and Rafidain Bank. They responded with a joint memorandum supporting Indictment of Rafidain, but opposing the Indictment of CBI.[74] As explained in their memorandum:

> -- The indictment would set a precedent for the assertion by foreign states of criminal liability on the part of the USG and its agencies. We would vigorously assert sovereign immunity in such a setting, and would not agree that we should submit to the jurisdiction of a foreign criminal court in order for that court to determine whether the

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[73] Fiebelkorn and New were dropped because they had negotiated plea agreements in exchange for their cooperation with the government's investigation and prosecution. New pleaded guilty on March 6, 1991; Fiebelkorn on April 3, 1991.

[74] Throughout the investigation, the prosecutors had treated CBI and Rafidain Bank in a virtually identical manner. Since both are wholly-owned by Iraq, they were both considered to be "agencies of a foreign government," and thus "sovereign" for purposes of international law. (October 1990 Pros. Memorandum at 118.)

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> US agency's actions were "commercial". We do not want to encourage foreign states to address complaints regarding allegedly criminal action by US agencies through their courts rather than diplomatic channels. We would not be able to confine the precedent to the facts of a particular case -- in fact, the links between the USG and the Federal Reserve System, the Export-Import Bank, and several other entities for which we would assert sovereign immunity from foreign criminal jurisdiction might be viewed by a foreign court as weaker than the link between most central banks and their states.
>
> -- Forfeiture of a central bank's assets could similarly be cited as a precedent by foreign states to justify an attempt to attach or seek forfeiture of the substantial assets of various USG agencies, including the Federal Reserve System and the Department of Defense, located outside the U.S.

(Memorandum from Jeanne Archibald, General Counsel, Treasury Department; Hart Fessenden, General Counsel, Export-Import Bank; J. Virgil Mattingly ("Mattingly"), General Counsel, Federal Reserve System; Terrence O'Donnell, General Counsel and Director, Department of Defense; and Edwin D. Williamson, Legal Adviser, Department of State, to Mueller, dated February 25, 1991.)

The prospect that Indictment of CBI could invite retaliation against the Federal Reserve, particularly in light of the onset of the Persian Gulf War, was regarded as an appropriate basis on which to drop CBI. Although the USAO continued to believe that CBI should be indicted because its conviction would permit forfeiture of substantial assets, it was precisely this possibility that supported the position of the other Executive Branch departments and agencies that CBI should not be indicted. This was

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the only decision made by the DOJ as to who should be included in the Indictment.

J. Omissions From The Indictment

On February 28, 1991, a 347-count Indictment was returned against the following defendants: Drogoul, Barden, DeCarolis, Entrade, Tezeller, Taha, Rasheed, Ali, Al-Habobi and Rafidain Bank. The Indictment included counts of conspiracy, mail fraud, false statements, obstruction of Congressional proceedings, money laundering, tax evasion, crimes relating to the USDA, Trading with the Enemy Act crimes relating to Cuban sugar, tax evasion and counts seeking criminal forfeiture. The final Indictment bore no resemblance whatsoever to the initial drafts produced in October 1989 and January 1990. It was substantially organized and more comprehensive and included Iraqi defendants as well as Rafidain Bank. It was the product of extended give and take, and some heated exchanges, between the USAO and the DOJ as these career prosecutors sought to return the strongest Indictment possible.

Some have criticized the prosecution for failing to indict Wafai Dajani, a Jordanian businessman who was affiliated with a company called Amman Resources. Specifically, allegations have been made that the State Department interfered with the prosecution because of Dajani's alleged "close ties" to Jordan's King Hussein, who had sided with Iraq during the Gulf War.[75]

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[75] It is clear that McKenzie was aware of Dajani's rumored "connections" midway into the investigation, as she noted in the April 1990 Prosecution Memorandum that "Drogoul often referred to Dajani as being very powerful because he was 'the brother of the Prince of Jordan.'"

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Dajani's company kept a ship in the Jordanian port of Aqaba to off-load grain from ocean-going vessels and package it for transportation to Iraq. Dajani and Drogoul first met in 1985 or 1986, when they were introduced by the Director General of the Iraqi Grain Board as Iraq was negotiating the terms and conditions for financing certain freight under the USDA CCC Program. (Ex. 16 at 7). Drogoul and Dajani began to establish what would become "an ongoing relationship." (Ex. 16 at 10). In early February, Clark and the USAO decided to draft a "global" Indictment naming almost everyone they previously had considered, to see how it would work. In that draft the USAO included Dajani, although the USAO did not seriously plan to indict him, at least not in the first phase of the prosecution. Accordingly, his name was removed at a meeting a few days later.

The prosecutors deny all allegations of State Department interference, and assert that their decision not to indict Dajani was solely their own. USAO and DOJ agree that at the time, they had insufficient evidence to indict him on a "BNL as victim" theory. (See October 1990 Pros. Memorandum; January 1991 Pros. Memorandum.) They recognized that "it was very clear that Dajani had worked assiduously and profited enormously as a middleman between Drogoul and the Iraqis," but without cooperation from Drogoul to implicte him, lacked proof of his complicity in a fraud against BNL. Their evidence was piecemeal and of questionable

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admissibility.[76] The USAO sought to interview Dajani, but Dajani evaded these efforts.

Until August 1992, Drogoul refused to implicate Dajani, firmly maintaining that Dajani had no knowledge of the illegal transactions. We now also know, as the USAO and DOJ could not have known in February 1991, that Dajani had offered Drogoul a consulting position through which Drogoul was paid $100,000 in 1990-91. In any event, Dajani is an unindicted co-conspirator in the action.

As I noted above, the USAO prosecutors also had considered indicting Al-Habobi, the Chief Executive Officer of MCC and MCL, as well as MCC and MCL themselves. In early February 1991, McKenzie decided that the proposed Indictment of Al-Habobi was more significant than charging either MCC or MCL, because (1) MCC's assets had been frozen by the Office of Foreign Asset Control; (2) MCL had been almost completely divested of its Iraqi interests by a British agency; and (3) the new owners of MCL were non-Iraqi. The USAO attorneys concluded that there was no reason or law enforcement objective to be obtained by proceeding against either MCC or MCL because no additional Iraqi assets could be obtained by indicting either entity. This represents a significant departure from USAO's April, 1990 prosecution theory which envisioned including examination of MCC in the investigation's second phase. Both the freezing of MCC's assets and the divesture

[76] A handful of telexes purported to demonstrate Dajani's posture as a go-between, but the USAO had developed no means of proving that Dajani sent or received them.

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of MCL occurred after the April 1990 Prosecution Memorandum was written.

In addition to the criticism lodged against the USAO for failing to indict MCC, it also has been alleged that the prosecution destroyed evidence relevant to MCC.[77] I have found no credible evidence of prosecutorial wrongdoing in the form of either the destruction of evidence or in the decision not to include MCC as a defendant in the Indictment. Moreover, since investigations of the activities of MCC and MCL are still in progress, the possibility of future Indictments cannot be excluded. (Memorandum from McKenzie to Brill, dated February 6, 1992.)

K. Analysis Of The Indictment

Of great significance is that the Indictment resulted from a careful analysis of the available evidence and sworn testimony of numerous witnesses before the Grand Jury. The possible role of BNL officers and entities above Drogoul's level was amply investigated as the Grand Jury heard from present and former BNL officers and employees from New York, Rome, and elsewhere, who appeared without grants of immunity.

Although one or more memoranda indicate that as early as the Spring of 1990, McKenzie was anticipating the return of an Indictment, a lapse of 18 months between detection of the scheme and the Indictment's return reflects postponement based upon sound

[77] There also has been some public confusion about the possibility that USAO was using evidence illegally seized from MCC in Cleveland. In fact, USAO had issued a subpoena for the same documents and obtained them legally, but with some delay.

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professional analysis, a major factor in which was the DOJ's skepticism about the USAO's treatment of BNL-Rome. This skepticism endured up until the time that the various BNL officials went -- one by one -- before the Grand Jury.

Ironically, it has been suggested in certain of the media that it was the DOJ, perhaps influenced by others in the Executive Branch, that first favored casting BNL as victim, perhaps for foreign policy or diplomatic reasons, and that it forced its view upon the USAO. I have found absolutely no support for these reports. Indeed, the evidence is wholly to the contrary.

L. Should BNL Have Been Indicted?

At the outset of this discussion, I must confess to a preconception I held; that is, that a scheme so involved, and so massive in both amounts and number of transactions and persons and institutions involved, could not have escaped the attention of BNL's regional or Rome management and that, given the length of time it lasted (almost four years), the scheme had to have the express or implied authorization, or tacit acceptance, of Drogoul's superiors in New York and Rome.[78] Others, of course, have manifested the same belief, reflected, for example, in comments by many that Drogoul and his fellow players at BNL-Atlanta could not have carried out the scheme by themselves.

1. The USAO's Analysis

Documents reflect that, within a few months of the

[78] Indeed, some members of USAO's Task Force originally felt as I did. (See Ex. 9 at 6.)

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search, the USAO believed that it could frame a prosecution theory that BNL was a victim of the fraud committed by Drogoul and others within BNL-Atlanta and by non-BNL entities, and that it was most unlikely that BNL officials in New York or Rome had known of or authorized Drogoul's activities. (See Memorandum from McKenzie to R. Barr, dated October 31, 1989.) The USAO never discarded this perception of BNL's role. In fairness to that office, it must be said that in the many interrogations it conducted, not only of Drogoul, but of others, it always inquired into whether BNL in New York, Rome or elsewhere, knew of Atlanta's "off-book" and other concealed activities.[79]

In light of the publicity given the issue, I had the USAO submit to me in writing the reasons for its decision not to indict BNL and to treat it as a victim. Its response is included within its Analysis, (see Ex. 14 at 34-72). I have carefully reviewed that response. It is consistent with everything I have read in my review of the files of the DOJ and other government agencies, and with what I have learned in the numerous depositions and interviews I have conducted.

Supporting the contentions of the USAO are the many statements made by Drogoul prior to his taking the stand at his sentencing hearing, after having retained new counsel for the fourth time. In his earliest interviews with the USAO, Drogoul repeatedly asserted that neither the New York office of BNL nor the

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[79] As I have described in detail above, I can state without reservation that it was the USAO and not the DOJ that first arrived at the "BNL is a victim" theory of the case.

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Rome office authorized his "off-book" loan activities with Iraq, and he made clear that he was responsible for the concealing of these loans from his superiors, internal and external auditors and regulators. (Memorandum of August 10, 1989 Drogoul Interview; Memorandum of August 28, 1989 Drogoul Interview.)

In hundreds of pages of debriefing following his June 1992 plea agreement, and in handwritten and typewritten statements made available to the USAO at that time, including his typed statement (Ex. 16), Drogoul never once pointed to an official at BNL-Rome and charged that anyone had knowledge or had authorized the wrongful activities in Atlanta, not even when his second counsel, Williams & Connolly, advised him not to withhold such information because it could be helpful to his defense. Indeed, not until his sentencing hearing, after he retained new counsel, did the story change.

Some excerpts of Drogoul's statements follow:

> Drogoul made it quite clear that he had been responsible for the hiding of these loans from the main office and from the regulators." (Memorandum of August 10, 1989 Drogoul Interview.)
>
> He indicated that the New York Office of BNL was not aware of his activities, nor was the home office of BNL in Rome aware of his activities. Further, he indicated that before August 4, 1989, the Central Bank of Iraq had no knowledge that he was exceeding his authority, but should have known that he was exceeding his authority after this. (Memorandum of August 10-11, 1989 Drogoul Interview.)
>
> At no time did Drogoul ever name anyone other than his officers and employees at BNL-Atlanta who assisted, participated or actually knew of

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his 'off book' and otherwise allegedly unauthorized activity. Throughout his representation by Williams and Connolly, Drogoul always maintained that no one anywhere authorized, directed, protected or encouraged his 'off book' activity. (Memorandum of July 29, 1992 Drogoul Interview.)

According to the Atlanta firm, Drogoul never provided them with the name or names of any person or persons outside BNL-Atlanta who authorized, assisted, participated, directed, protected, encouraged or actually knew about his activity at BNL-Atlanta then under criminal investigation. Both law firms urged Drogoul not to hold back such information if it existed. (Memorandum of July 29, 1992 Drogoul Interview.)

I think I can say straightforward that I did not have formal approval from the Bank in Rome. . . . (June 2, 1992 Plea Transcript, testimony of Drogoul, attached hereto as Ex. 21 at 60.)

First of all, I don't want to give you the impression that I spoke to a person in Rome and said, 'This is what I am doing, A, B, C, D, E, F, G. Do you approve?' That never happened. There were discussions, many discussions with people, various people at different levels in Rome about my activities in general, but nothing in particular. (Ex. 21 at 64.)

The Court: Was anybody at the home office of BNL aware of your off-book set-up?

Mr. Drogoul: I would have to say they were aware -- not specifically, no, your Honor, but I would say they were aware we ware doing business in excess of the authorized limits. (Ex. 21 at 85.)

Drogoul never told anyone outside BNL-Atlanta the nature and extent of his 'off book,' unauthorized funding. (Memorandum of June 19, 1992 Drogoul Interview.)

Drogoul advised he did not tell anyone with BNL-Rome about the 'off book' transactions or about the other unauthorized loans.

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(Memorandum of June 23, 1992 Drogoul Interview.)

Drogoul said DeCarolis never told Rome about the 'off book' transactions and the overline situation. . .. Drogoul stated Decarolis never told Rome about the overline 'off book' amounts with Iraqi transactions and, in fact, repeatedly mislead rome regarding BNL-Atlanta's unauthorized Iraqi exposure. (Memorandum of June 29, 1992 Drogoul Interview.)

Drogoul advised he never talked to the BNL rep about the 'off-book' operation at BNL-Atlanta because it was out of the question. (Memorandum of July 6, 1992 Drogoul Interview.)

Drogoul advised he did not tell anyone in the BNL organization about the off-book operation, slush funds, concealed falsely booked transactions, CCC umbrella agreements, nor MTLs. Drogoul advised he did mislead and lie about the existence of the off-book operations, slush funds, concealed falsely booked transactions, losses, CCC umbrella agreements and MTLs to Monaco, Guadagnini, Sardelli, Messere and his staff, Russello, Campagniolo, BNL-London, BNL-Los Angeles, Laverone and Lombardi concerning the audit report reply. (Memorandum of July 6, 1992 Drogoul Interview.)

Drogoul advised many individuals in BNL knew a little something about Atlanta's business operations, however, they did not sit down as a group and put all of the pieces together to make any sense out of it or learn what Atlanta was doing. He does not believe anyone would have figured out that BNL-Atlanta had an 'off book' graybook operation . . . . (Memorandum of July 9, 1992 Drogoul Interview.)

Drogoul advised that although the press and media say that officials in BNL-Rome had to have known about his grey book or 'off book' operation, he had no conversation with any BNL official about the grey book. He stated that he never told anyone in the press or media that a BNL-Rome official was told about the grey book. Only personnel on his staff were

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> told about the grey book and there was no reason to discuss it with anyone such as customers, because it would botch things up and get them caught. (Memorandum of July 13, 1992 Drogoul Interview.)
>
> He stated that the reason most people did not understand how $4.5 billion could be concealed was because no one ever saw the entire concealment. When he received questions about a particular overline or 'off book' situation he would offer a reasonable explanation. (Memorandum of July 13, 1992 Drogoul Interview.)
>
> However Drogoul did not know what, if anything, anyone in top management knew about their 'off book' operation." (Memorandum of August 18, 1992 Drogoul Interview.)

In addition, BNL-Rome would hardly have authorized Drogoul at BNL-Atlanta to land money to the Iraqis so that the Iraqis could use it to cash-collateralize letters of credit at BNL-Rome, which was done on more than one occasion. (Ex. 13 at 24-25.) Drogoul would borrow from the money brokers and pay interest to them on the funds he was lending to the Iraqis. These funds would then go through the Morgan Guaranty clearing account of BNL-Atlanta to Iraqi accounts in one of four banks in New York. From there it would be wired overseas and further disbursed until it finally came together as cash collateral that the Iraqis would post with BNL-Rome. BNL-Rome, of course, had to pay the Iraqis interest on this deposit -- i.e., interest on its own funds. Surely BNL-Rome would not have authorized this.[80]

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[80] Nor can it be said that BNL-Rome would have authorized the Entrade transactions, where bribes in excess of $2 million were paid for Drogoul's benefit, including $290,000 paid to Von Wedel. Drogoul, at his sentencing hearing, admitted only a portion of

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Further support for the USAO prosecution theory is found in Drogoul's statements that prior to extending new loans, he sought to have the early Iraqi loans repaid. It appears that Drogoul tried -- unsuccessfully -- to extricate himself from mounting Iraqi pressure to lend even larger sums of money. He indicated that he was reluctant to sign the third MTL and told Taha and Ali that he "had already done a lot. Taha said he understood (being a banker), but Ali kept pushing hard." (Minutes of Meeting at BNL-Atlanta, dated August 21, 1989.) Drogoul feared, however, that if he ceased lending money, the Iraqis would halt payments on the money they already had borrowed. Had Rome known about or authorized the loans, Drogoul would have been less fearful of the consequences of Iraqi nonpayment.

Moreover, the sheer magnitude of the fraud is consistent with the USAO's theory that Drogoul lacked authority for the loans. The sums were so enormous (and the terms to BNL-Atlanta so unfavorable) that it is doubtful that any prudent bank would have willingly and deliberately exposed itself to so much risk.[81] There also was evidence that BNL-Rome lacked the capability to monitor its worldwide borrowing position, which suggests that the loans could have escaped Rome's attention. (Memorandum from

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[80](...continued)
this. When he was debriefed in August 1989 Drogoul did not disclose he had been bribed at all. He did point the finger at Von Wedel, however. (See e.g. Ex. 19.)

[81] Although the CCC loans were guaranteed, between February 22, 1988 and April 1989, Drogoul committed BNL to uncollaterized loans to the Iraqis in excess of $2 billion.

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Federal Reserve Examiner Madeline Marsden ("Marsden") to Kelley, dated September 25, 1989.)

Drogoul also engaged in undeniable acts of concealment.[82] Drogoul, recognizing that he had to give some explanation for these acts of concealment, testified at his Sentencing Hearing that he did this to deceive Luigi Sardelli ("Sardelli"), who was at one point BNL's Regional Manager in New York. (Testimony of Drogoul, dated September 30, 1992, at 1752-53.) The fact is, however, that acts of concealment, such as the "skipping" of loans, began well before Sardelli came on the scene. They began in 1985, when Renato Guadagnini was the Regional Manager in New York. Sardelli did not become Regional Manager until the early part of 1987, where he remained until approximetely the end of 1988. These acts of concealment, and the voluminous number of fictitious telexes, letters and other falsified documents seized during the August 1989 search, demonstrate that Drogoul went to tremendous lengths to hide the true nature of his activities from anyone within BNL who was not affiliated with the Atlanta office and from any auditors or regulatory agencies.

The USAO also had available to it, prior to preperation of the final Indictment, the results of audits and examinations at BNL-Atlanta. As established by the records, and presented at the sentencing hearing in the testimony of Wade as Chart 27 (Ex. 22), there was an audit by Peat Marwick on December 31, 1985, the report

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[82] These are summarized in the USAO Analysis (Ex. 14 at 20-29) and Wade Overview. (Ex. 13, at 10-17, 23-24.)

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of which issued on February 21, 1986. In 1986, there were also audits by BNL's internal auditors, the U.S. General Accounting Office, the State of Georgia (along with the Federal Reserve) and again, Peat Marwick. In 1987 there was an examination report by the Federal Reserve on January 26, and additional audits by the BNL internal auditors, Peat Marwick, the State of Georgia, the General Accounting Office, the State of Georgia again (accompanied by the Federal Reserve), and Peat Marwick.

On March 4, 1988, Peat Marwick issued its audit report based upon the examination commenced on December 22, 1987. In 1988, there were also audits by the State of Georgia (accompanied by the Federal Reserve), the General Accounting Office and the BNL internal auditors (whose audit report issued on December 22, 1988).

On February 6, 1989, Peat Marwick began another audit, and issued its report on March 10, 1989. In 1989, the General Accounting Office, the State of Georgia (accompanied by the Federal Reserve), and the BNL internal auditor began audits. The BNL internal audit report issued on July 26, 1989, approximately one week before the August 4 search was conducted, and even while the BNL-Atlanta informants were talking to the USAO.

While some of the BNL internal audit reports showed certain irregularities in BNL-Atlanta's records, none of these audits, or any others, led any of the auditors to suspect the "off-book" activities or other unauthorized activities of BNL-Atlanta.

Certain of the fellow employees of Drogoul, at least up until the Drogoul sentencing hearing, pleaded guilty in this

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matter.[83] Particularly significant is Von Wedel's testimony on March 7, 1991. There, Von Wedel indicated that the loans were unauthorized by BNL-Rome. At the plea hearing, the Court carefully conducted a Fed.R.Crim.P. 11 examination, and then called upon McKenzie to state what "the government's evidence" would show. (Transcript of Von Wedel, dated March 7, 1991 at 19, attached hereto as Exhibit 23.)

McKenzie presented in great detail what the Government's case would be at trial, were the cass to be tried against Von Wedel. She listed the wrongful extensions of credit in which Von Wedel had participated, including the CCC guaranteed credits to finance the purchase of agricultural commoditiee to be exported to Iraq. The total of those "were not authorized by BNL-Rome" was $1.89 billion. (Id. at 19.) Von Wedel also signed (with Drogoul) the first two of the unsecured MTL agreements with Iraq, one for $200 million in February 1988, and another for $300 million in October 1988. It was at this point, McKenzie noted, that Von Wedel refused to go any further because he found out that Atlanta had "far exceeded its authority from BNL-Rome." (Id. at 20.)

The Court then addressed Von Wedel, first asking him whether the recitation by McKenzie was "substantially correct." Von Wedel responded, "I have no problem with that statement, Your

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[83] Since the sentencing hearing, Fiebelkorn has indicated that he may want to withdraw his plea, but I have not been advised that he has filed such a motion yet. The others who have pleaded guilty have not indicated that they intend to withdraw their pleas.

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Honor." (Id. at 23.)

The Court then asked, "Well, did you recognize that unauthorized [CCC] credit agreements were being entered into with the Iraqi government?" (Emphasis supplied.) Von Wedel answered "Yes, Your Honor." (Id. at 24.)

The Court then asked whether Von Wedel was a party to the $200 million and $300 million MTL loans, and Von Wedel stated that he was. The Court addressed the Entrade transaction, in which Entrade had made substantial payments to Von Wedel. McKenzie broke in and asked, "Did you give them [Entrade] unauthorized funding from BNL-Atlanta"? and Von Wedel answered, "Yes." (Id. at 25-26.)

The Court then said, "Didn't you recognize during this period when these types of procedures were taking place, unauthorized credit agreements were being executed, that some day there would be a day of reckoning"? (Emphasis supplied). Again Von Wedel responded, "Yes, Your Honor." (Id. at 26.)

The Court again asked, "Did you recognize that these credit agreements with the Iraqi government were unauthorized"? (Emphasis supplied). Von Wedel responded, "Yes, Your Honor, I did." (Id. at 27.) The Court repeated, "And did you recognize that these unsecured loans that were being made to Iraq were not authorized"? (Emphasis supplied). Von Wedel answered, "Yes, Your Honor. That is why I, at mid-stream, I stopped doing all activity with Iraq." (Id. at 23-27.)

Although some of the testimony I have recited above represents statements made following the return of the Indictment

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on February 28, 1992, the vast bulk of the evidence I have reviewed is consistent with the USAO prosecution theory. More particularly, I find that the evidence collected and developed by the USAO and Task Force by February 1991 provided an insufficient basis on which to seek indictment of BNL. Indeed, it was this very issue that was thrashed out in strenuous negotiation between the USAO and DOJ, even though Clark apparently was not persuaded to the USAO's view until he at in the Grand Jury room.

2. Competing Considerations

On the other hand, there are many troubling details in the materials developed both before and after the Indictment that cannot be squared with the prosecution theory. The fact that Drogoul has withdrawn his guilty plea and now contends that BNL knew of his unauthorized activities requires that those details be given a fresh look, even though some of them already have been investigated.[84]

For example, the details of the BNL internal audits of BNL-Atlanta present a series of curious coincidences. According to the Italian Parliamentary Report (Ex. 20), tha first internal audit of BNL-Atlanta was conducted in June, 1986, by Vito Cannito ("Cannito"). Cannito's report, which indicated that Iraqi loans sharply exceeded authorized limits, was submitted to Guadagnini eight months after the audit. Apparently it did not surface in Rome until three years latsr, after August 4, 1989. The Italian

[84] Although Drogoul had long pointed to winks, glances and knowing smiles from BNL officials, he never provided any specifics and, accordingly, I have discounted those statements.

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Parliamentary Report asserts that after Cannito's promotion within BNL, he warned Drogoul of upcoming internal inspections.

Cannito's successor, Louis Messere ("Messere"), conducted an audit of BNL-Atlanta in September, 1988. Messere's 1988 audit report, which issued December 22, 1988, failed to mention BNL-Atlanta's account at Morgan Guaranty Trust Company or any of Atlanta's agreements with Iraq. In December, 1988, by Sardelli, Guadagnini's successor, forwarded a copy of the Messere audit report to Rome, but this too was misplaced or diverted. In addition, Sardelli wrote a letter criticizing Drogoul and sent it to Rome with Constantini ("Constantini"), a travelling inspector for BNL. The letter was never delivered. (January 1991 Pros. Memorandum at 46.)

After Messere's 1988 audit, Sardelli apparently admonished Drogoul about Atlanta's poor bookkeeping and organizational controls. Drogoul evaded Sardelli's questions, noting that BNL-Atlanta was by far the most profitable of the North American branches, and Sardelli apparently dropped his accusations.

It is also possible that the DOJ or the Task Force did not realize from their review of the reconstructed documents that as a result of the "skipping" of loans on the last day of the month, BNL-New York (and Guadagnini) must have been on notice of the irregularities in Atlanta. BNL-New York received computer reports reflecting BNL-Atlanta's loan balances on three different days of the month. The reports on the last day of the month, which were sent to Rome, did not reveal the skipped loans, but the other

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reports did disclose the true exposure. BNL-New York may have noticed the discrepancies, because it apparently asked BNL-Atlanta, on different occasions, to explain why Atlanta always "lost" assets at the end of the month. (Ex. 16 at 49, 106, 109.) By 1987, Atlanta was losing approximately $400 million at the end of each month. (Id.)

Drogoul's revisionist position that certain persons within BNL should have known about the Atlanta schema is not without support from Drogoul's associates in Atlanta. Ivey apparently claimed that Messere (the BNL auditor) must have known about the scheme, as well as Teodoro Monaco ("Monaco"), who had bumped into Drogoul in Baghdad. (Minutes of October 18, 1989 meeting with Ivey and Luciani Silvestri, Counsel for BNL-Rome.)

Among the many singular transactions in which Drogoul engaged are the Danieli transactions, which are noteworthy because they lend themselves to two conflicting interpretations: on the one hand, that Monaco, a mid-level manager, suspected that some sort of unauthorized activity was taking place; and on the other hand, that BNL paid interest on its own funds, thereby suggesting that officials at Rome would never have authorized Drogoul's activities.[85]

The details of the transactions are complicated (and Monaco and Drogoul often contradict each other in their accounts of

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[85] These interpretations may be reconciled if certain individuals at BNL-Rome had general knowledge about Drogoul's activities, but no specific information regarding the details of the scheme.

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what occurred), but they generally may be explained as follows: sometime in 1989, the Danieli firm signed two contracts with the Iraqis for the manufacture of a steel manufacturing facility. Although Danieli was a longstanding client of the Udine branch, Monaco decided to direct the transaction to the Atlanta branch, purportedly because of Atlanta's CCC connections and familiarity with Iraq.[86] BNL understood that the first contract would consist of an Iraqi cash advance payment for 10 percent of the contract amount, and the remaining 90 percent was to be a letter of credit fully collateralized by a corresponding amount of Iraqi cash on deposit with the bank.[87] In due time, BNL-Atlanta received from the Central Bank of Iraq two letters of credit totalling $80 million, a substantial sum by BNL-Atlanta standards.

According to Monaco, Drogoul was told that the letters of credit had to be guaranteed by cash collateral, pursuant to BNL policy. He also instructed Drogoul to prepare a telex in order to formalize the request to the head office. Drogoul did not comply with either of these directives. Monaco attested that although he knew that Drogoul did not file a formal request for authorization, Drogoul led him to believe that BNL-Atlanta had received the cash

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[86] Although Monaco could have selected the London branch of BNL, he did not do so because Iraq recently had deposited funds in London to fully collateralize a few transactions. These deposits apparently were designed to convince Monaco that Iraq wanted to re-establish a relationship with BNL (which is what Drogoul told Monaco when he ran into him in Baghdad).

[87] The second contract was similar to the first, except that only 5 percent has to be collateralized by the Iraqis and the remaining 85 percent has to be fully guaranteed by the Italian government through SACE.

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collateral required for the guarantee and he thus thought the transaction was risk-free. (Ex. 16 at 115.) However, Drogoul stated that Monaco knew that BNL-Atlanta held insufficient cash to issue the letters of credit. Drogoul implied that Monaco wanted the deal to go through because it was so very lucrative and Danieli was an important customer of Pedde.

In these transactions, Drogoul borrowed from the money brokers and paid interest on the money he was lending to the Iraqis. This money would then go through the Morgan Guaranty clearing account of BNL-Atlanta to Iraqi accounts in one of four banks in New York. From there it would go overseas and be further disbursed until finally coming together as the cash collateral that the Iraqis posted with BNL. Thus, BNL paid the Iraqis interest on the deposit, in other words, interest on its own money. It is difficult to fathom why BNL would have voluntarily and deliberately engaged in this scheme.

M. Conclusion

My review of the evidence available to the USAO at the time of the Indictment convinces me that the prosecutors' decision to pursue a prosecution theory in which BNL-Rome was a "victim" was entirely proper. They lacked sufficient evidence on which to base an Indictment of BNL or BNL individuals, and at the time of the Indictment the evidence in support of their theory was overwhelming. Although some have suggested that BNL's early cooperation with the USAO was so seductive that the prosecutors failed to give adequate consideration to other possibilities, my

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review convinces me that this was not so.

The negotiations and discussions between the DOJ and the USAO were extensive, and the decisions leading to the Indictment were not committed to lightly. But they were not colored by political or other improper motives. In any event, these types of spirited negotiations should not be captured by criminal provisions, and are not captured by those I have considered (see Section X, infra.) "within the juriediction of any department or agency of the United States." Even if they were applicable, the evidence I reviewed is clear and convincing that no one acted with corrupt or improper motive.

VI. THE FOREIGN POLICY OF THE UNITED STATES - DID IT AFFECT THE GOVERNMENT'S INVESTIGATION AND PROSECUTION OF THE BNL MATTER?

It is important to understand that the criticism by Representative Henry B. Gonzalez, Chairman, Committee on Banking, Finance and Urban Affairs of the House of Representatives ("Gonzalez Committee") of the investigation and prosecution of the BNL matter derives from criticism of the Reagan and Bush Administrations' foreign policy toward Iraq during the 1980s. The structure of Representative Gonzalez' reasoning is this: that BNL-Atlanta financing of Iraq and certain of its institutions advanced U.S. foreign policy goals; that U.S. foreign policy failed because the U.S. was exploited by Iraq to strengthen tha Iraqi military potential but failed to influence Iraq's behavior in favor of the U.S.; and thet, to avoid public exposure of the failure of that policy, and to refrain from embarrassing the Government of Italy,

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which owns BNL, the Bush Administration engaged in a "coverup" that was implemented by corrupting the DOJ and USAO in their prosecution of BNL in Atlanta.

A. The United States' Foreign Policy Toward Iraq

In 1979, in the face of evidence that Iraq was providing aid to Abu Nidal and other terrorist organizations, the Carter Administration added Iraq to the list of nations supporting terrorism. Under the then prevailing export controls, this designation prohibited Iraq from purchasing many U.S. goods, including civilian aircraft and military equipment. (137 CONG. REC. H846-847 (daily ed. February 4, 1991) (statement of Rep. Gonzalez).)

The Iranian revolution, the hostage crisis, and the inception of the Iran-Iraq war in 1980, however, drastically changed the Middle East political landscape as perceived by this Nation. In 1981, President Reagan's Administration reevaluated our foreign policy toward Iraq as it considered strategies available for countering Iran's power and halting the spread of Islamic fundamentalism. Gradually, we adopted a policy of aiding Iraq.

In February 1983, the Reagan Administration removed Iraq from the list of countries supporting terrorism, thereby lifting the export restrictions established four years earlier. Iraq was offered economic and political incentives, including export credit guarantees supplied by the USDA CCC program and loans through the Eximbank. In January 1984, a State Department memorandum recommended easing restrictions on certain "less sensitive exports"

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to Iraq, such as heavy trucks, which "probably [have] a negligible effect on Iraq's military capabilities." This recommendation was approved. (Memorandum from David T. Schneider (NEA) and Jonathan Howe (NSC) to the Secretary of State, dated January 30, 1984.) In that same year, 1984, the U.S. extended full diplomatic recognition to Iraq after a lapse of 17 years. (137 CONG. REC. H846-847 (daily ed. February 4, 1991) (statement of Rep. Gonzalez).)

This policy shift in favor of Iraq was controversial, given Iraq's poor human rights record and its aggressive program to expand its military capabilities. It has been reported that between 1983 and 1985, Iraq began a missiles program, used chemical weapons against both military and civilian populations, and entered into a nuclear cooperation agreesent with Egypt and Pakistan. In 1986, while the State Department still harbored concerns about Iraqi terrorist activities, it appaars that the Department was satisfied that Iraq had made substantial progress in curtailing terrorist involvement. (Memorandum from Frank McNeil (INR) to the Secretary of State, dated July 1, 1986.) Iraq was viewed as offering unique foreign policy opportunities to the United States, particularly as that foreign policy sought to contain the Iranian influence in that part of the world.

In February 1986, the United States contemplated licensing high technology exports to Iraq, but refused to directly supply U.S. military technology to Iraq, given the official U.S. position of neutrality in the Iran-Iraq war. (Cable from U.S. Embassy in Baghdad to the Secretary of State, dated February 12,

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1986.) Nevertheless, between 1985 and 1990, the Reagan and Bush Administrations approved hundreds of export licenses for Iraq. (137 CONG. REC. H6697-6698 (daily ed. July 27, 1992) (statement of Rep. Gonzalez).) It is said that many of these licenses were for "dual use" items, such as heavy trucks and computers, susceptible to both civilian and military applications. (Stanley Cloud, Lone Wolf or a Pack of Liars?, Time, Oct. 26, 1992, at 40.)

After the Iran-Iraq cease fire in 1988, President Bush adopted the approach taken by the Reagan Administration and continued to offer Iraq incentives to join the "family of nations." On October 2, 1989, President Bush signed National Security Directive 26 ("NSD-26") in an effort to foster economic and political ties with Iraq. I have obtained from the NSC a declassified version of that document (Ex. 24.), which reads, in pertinent part, as follows:

> Normal relations between the United States and Iraq would serve our longer-term interests and promote stability in both the Gulf and the Middle East. The United States Government should propose economic and political incentives for Iraq to moderate its behavior and to increase our influence with Iraq. At the same time, the Iraqi leadership must understand that any illegal use of chemical and/or biological weapons will lead to economic and political sanctions, for which we would seek the broadest possible support from our allies and friends. Any breach by Iraq of IAEA safeguards in its nuclear program will result in a similar response. Human rights considerations should continue to be an important element in our policy toward Iraq. In addition, Iraq should be urged to cease its meddling in external affairs, such as in Lebanon, and be encouraged to play a constructive role in negotiating a settlement with Iran and cooperating in the Middle East

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peace process.

Strong voices in Congress have contended that our foreign policy toward Iraq, as embodied in NSD-26, and thereafter implemented, was a mistake. Iraq invaded Kuwait in August 1990, and before long, the U.S. was involved in war with Iraq as well. Critics have said that the decisions of the Reagan and Bush Administrations to encourage U.S. ties to Iraq allowed Iraq's illicit military procurement network to flourish in this and other countries. From this proposition they move to the massive aid given Iraqi institutions in 1985-1989 by BNL-Atlanta, charging that in 1988-1989, through the MTL loans, Iraq was enabled to acquire military equipment through the Iraqi military procurement network. It is also contended that commodities purchased by Iraq pursuant to the USDA CCC guarantee program financed by BNL-Atlanta in 1985-1987 were diverted or bartered to obtain arms for Iraq's military.

Even if some of the foregoing assertions are unfounded, there is no uncertainty about what U.S. foreign policy was, nor is there any question that it failed to achieve what was sought. I now turn to the question whether the Administration attempted to "cover up" this failed foreign policy by improperly interfering with the BNL investigation and prosecution.

B. Was Improper Influence Attempted Or Exerted Upon DOJ Or The Atlanta USAO In The BNL Investigation And Prosecution?

1. The Commodity Credit Corporation

I shall examine this question in the first instance through consideration of a specific program, namely, the CCC GSM-

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102 and GSM-103 program. As described above, BNL participated in the CCC program in the sale of U.S. products to Iraq. This participation came under close scrutiny by, among others, Representative Gonzalez.

Representative Gonzalez had been planning to convene a hearing of his Committee on the BNL matter in October 1990, when he received a telephone call from then-Attorney General Thornburgh in September 1990. This call was prompted by a memorandum to Thornburgh from W. Lee Rawls of the DOJ Office of Legislative Affairs, which described unsuccessful attempts by DOJ officials to discourage the Committee investigation. Rawls advised Thornburgh that "[o]ur best attempt to thwart any further congressional inquiry by the House Banking Committee into this case is to have you contact Chairman Gonzalez directly." (Memorandum from Rawls to Thornburgh, undated.)

When Representative Gonzalez refused to discuss the matter with him, Thornburgh wrote a letter expressing his "profound disappointment" in Representative Gonzalez's decision to ignore DOJ's "strong objections." Thornburgh added:

> As you should be aware, this is a sensitive case with national security concerns. The United States Attorney in Atlanta advises me that both witness security and the willingness of witnesses to continue to cooperate with the investigation and prosecutions will be jeopardized by your Congressional staff interviews and hearing.

(Letter from Thornburgh to Gonzalez, dated September 26, 1990.)

Representative Gonzalez took this communication as an attempt to interfere with his Committee's investigation. The unfortunate use of the words "national security" may have led

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Representative Gonzalez to conclude that DOJ sought to obstruct a Congressional inquiry when, instead, it sought to protect the integrity of an ongoing criminal investigation. Indeed, this impression, combined with BNL's involvement in the CCC program with Iraq, led Representative Gonzalez and others to question whether this perceived interference with his Committee's investigation was part of a larger "coverup" of the Administration's "flawed" foreign policy, which included promoting the extension of CCC credit guarantees for Iraq.

Consistent with U.S. foreign policy at the time, the GSM programs were used by both the Reagan and Bush Administrations to strengthen the U.S.-Iraq relationship.[88] The GSM programs were

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[88] Eximbank has also been an important element in the relationship between the U.S. and Iraq. Eximbank has financed U.S. exports to Iraq by providing guarantees, insurance and loan support to United States exporters and banks, thereby indemnifying them against the risk of nonpayment. (137 CONG. REC. H848 (daily ed. February 4, 1991) (Statement of Rep. Gonzalez).)

As with the CCC program, political considerations have been brought to bear upon Eximbank decisions. (Memorandum from Kimmitt to Baker, dated April 17, 1990.) It has been alleged that in 1984, Eximbank, which had initially concluded that Iraq was not creditworthy, was successfully pressured by then-Vice President George Bush to agree to provide financing for the Aqaba pipeline in Iraq. (Waas and Unger, In the Loop: Bush's Secret Mission, The New Yorker, November 2, 1992, at 71.) By 1989, however, Eximbank had concluded that Iraq was "not creditworthy by any reasonable standard." (April 24, 1989 Creditworthiness Assessment of Iraq.)

Eximbank did not bow to political pressure when, while considering a proposal for a Volvo-General Motors Truck plant in Iraq, Eximbank received letters from Congressmen and the Governor of Utah (where a Volvo-General Motors facility was located), urging that Eximbank finance the project. (Letter from Senator Sanford, et al., to James R. Sharpe, dated August 4, 1989; letter (continued...)

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designed to expand foreign markets for U.S. agricultural commodities in specified countries that would normally be unable to purchase these goods on credit. (137 CONG. REC. H848 (daily ed. February 4, 1991) (statement of Rep. Gonzalez).) Under these programs, the CCC guarantees payment to exporters of U.S. agricultural products of a percentage of the "port value" of goods shipped in the event of default. Exporters often sell these guarantees to financial institutions at a discount rather than wait for payment from the importing country.

Before the beginning of each year, USDA negotiates through its Commodity Divisions and the Foreign Agricultural Service ("FAS") with foreign countries interested in participating in the GSM programs. FAS then allocates the credit guarantees among the potential recipients, establishing specific "country lines" by commodity. (137 CONG. REC. H848 (daily ed. February 4, 1991) (statement of Rep. Gonzalez).) These proposed allocations are subsequently presented for advice to the National Advisory Council on International Monetary and Financial Policy ("NAC"), an

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[88](...continued)
from Senator Hatch, et al., to John Macomber, dated September 13, 1989; and letter from Governor Norman H. Bangerter to John Macomber, dated September 27, 1989.) Eximbank refused to fund the project, apparently because of concerns about Iraqi creditworthiness. (Letter to Governor Bangerter from John Macomber, dated September 27, 1989.) According to Drogoul, the Iraqis turned to BNL-Atlanta for financing upon learning of Eximbank's refusal. (Memorandum of August 18, 1992, Drogoul Interview at 8.)

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interagency body[89] established pursuant to 22 U.S.C. § 2866 to advise the President on general policy directives for the International Monetary Fund, Eximbank, the CCC and other agencies that participate in making foreign loans or engage in foreign financial, exchange or monetary transactions.

Iraq began purchasing U.S. agricultural commodities under the GSM program in 1983, when the United States and Iraq reestablished diplomatic relations. Iraq was engaged in what became an eight-year war with Iran, and wanted to obtain food on credit. At the same time, the United States had a surplus of many agricultural commodities, and determined that Iraq's long-term food needs presented significant market development potential. (October 16, 1990, Testimony of F. Paul Dickerson before Gonzalez Committee at 8.)

In 1983, Iraq purchased $364 million in U.S. agricultural commodities under the GSM-102 program. The program grew throughout the 1980s, with peak allocations in 1989 and 1990 of over $1 billion annually. (Id.) In fact, by 1990, Iraq accounted for approximately one-fifth of the total GSM credit program, and was

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[89] The NAC is composed of the Secretary of the Treasury, who is Chairman of the Council; the Assistant to the President for Economic Affairs, who is Deputy Chairman; the Secretary of Commerce; the Chairman of the Board of Governors of the Federal Reserve System; the Chairman of the Institutional Development Cooperative Agency; and the President of the Export-Import Bank. By Executive Order, the President has delegated to the Secretary of the Treasury most of the functions and responsibilities conferred on him to administer the NAC.

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one of the largest importers of U.S. agricultural products.[90] (Letter from Reps. Brooks and Andrews to Sec. Yeutter, dated May 7, 1990.)

Public attention first centered on Iraq's involvement in the CCC program during the negotiations for Iraq's CCC allotment for FY 1990. In early October 1989, just two months after the FBI-Federal Reserve search of BNL-Atlanta, USDA first proposed to the NAC a program for Iraq involving $1 billion in export credit guarantees. USDA encountered strong opposition from the Federal Reserve and the Treasury Department, both of which expressed grave concerns about Iraqi creditworthiness, and raised questions about the implications of the unfolding BNL matter. Although this first effort failed, USDA continued to press for a full $1 billion program for Iraq. The State Department[91] gave strong support to this proposal as a natural reinforcement of U.S. foreign policy in

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[90] After 1987, BNL was no longer involved in extending credits to Iraq under the CCC program, having moved to MTL agreements, although Iraq continued to participate in the program.

[91] In early November, 1989, Jay Bybee, then-Associate Counsel to President Bush, was asked by Deputy White House Counael John Schmitz to obtain background information on the proposed CCC loan guarantees to Iraq. According to Bybee, Schmitz was concerned that USDA and the Department of State were moving too quickly, and he "wanted to know whether there was any reason why the White House Counsel's office shouldn't work within the White House to try to stop the loan guarantees to Iraq." (Memorandum of Interview, dated July 16, 1992, Bybee Interview.) Bybee claims, and I have seen no evidence to contradict him, that be called for the sole purpose of obtaining publicly availeble information about the status of the investigation, and did not attempt to exert any pressure on the USAO to change the pace or nature of the investigation. McKenzie supports this, and stated she sensed no preesure from Bybee's call, nor was her handling of the case influenced in any way.

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the Persian Gulf.

By mid-October, the magnitude of the BNL matter and its implications for the CCC program were beginning to emerge and so it was determined that a USDA team from the General Counsel's Office ("USDA-OGC") would be sent to Atlanta to conduct a separate investigation pursuant to USDA's regulatory authority over the CCC program.[92] On October 11, 1989, two members of the USDA-OGC met for several hours with McKenzie and others to discuss the status of the case.

McKenzie was limited by Georgia local district court rules and the need to protect the ongoing investigation of BNL-Atlanta and others as to the information she could release. She briefed the USDA-OGC representatives within permissible parameters, however, about the evidence she had at that time. According to memoranda describing that meeting, McKenzie advised them of possible irregularities with respect to "consulting fess" paid to Iraqi companies (including XYZ Corp. and Matrix-Churchill), kickbacks to BNL employees from Entrade, Inc. (a major GSM exporter), Iraqi bartering of CCC shipments, over-pricing, and the shipment of non-agricultural and non-U.S. goods through the CCC program. (Status Report from Brosch to Conway and Bullington, dated October 20, 1989.)

Following further investigation, including a trip to

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[92] Special Agents from USDA's Inspector General's office were already participating in the criminal investigation in conjunction with the USAO, but their work was entirely separate.

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Baghdad to interview Iraqi officials, the USDA issued a report of its findings in May 1990. By this time, six Iraqi defendants had been included in the latest draft of the BNL Indictment. Having been furnished with a draft report stating that there was insufficient evidence of Iraqi complicity in BNL-Atlanta's loans, McKenzie said that the report did not accurately reflect the information she had provided to USDA-OGC. She wrote a number of letters to her superiors at DOJ asserting that USDA had ignored the information she had offered and warning that the USAO might be unfairly charged with nondisclosure of relevant information.[93] (See, e.g., Memorandum from McKenzie to Urgenson, dated May 7, 1990.)

As we now know, primarily on foreign policy grounds and

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[93] On May 7, 1990, McKenzie wrote to Urgenson that the draft USDA report "reinforces the position of this office that USDA should be notified in writing of Iraqi complicity in criminal violations." She asserted that specific information orally provided to USDA by the USAO had been "totally ignore[d]," and added that:

> This office certainly recognizes that we do not 'make policy,' nor do we seek to do so. However, when relevant information is shared with policy makers and we have reason to believe that such information is being 'misunderstood' to such an extent that Congress may be mislead [sic], it seems appropriate to correct any such 'misunderstanding' before the remaining $500 million in CCC guarantees for Fiscal Year 1990 are extended to Iraq.

(Memorandum from McKenzie to Urgenson, dated May 7, 1990.)

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out of consideration for our agricultural interests,[96] USDA and the State Department ultimately overcame NAC resistance and on November 8, 1989, obtained NAC approval for $1 billion in CCC funding for Iraq in Fiscal Year 1990, from which one $500 million tranche was released prior to the 1990 Gulf War. This decision was very controversial, and the varying positions were strongly stated. For example, an internal State Department memorandum to Secretary James A. Baker, III, warned that "our ability to influence Iraqi policies in areas important to us, from Lebanon to the Middle East peace process, will be heavily influenced by the outcome of the CCC negotiations." (Memorandum from Kelly and Sofaer (through Kimmitt and McCormack) to the Secretary of State, dated October 26, 1989.)

As a basis for extending the guarantees, USDA and the State Department asserted at each stage of the process that there was "no evidence to date that would lead us to recommend that the Department should not extend the guarantees [to Iraq]." (Informational Memorandum from Snead to the Deputy Secretary, USDA, dated November 8, 1989.) This claim, of course is inconsistent with McKenzie's statements to the contrary.

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[96] Agricultural interests lobbied strongly in favor of providing further CCC guarantees to Iraq. For example, between March and June 1990, at least twelve Members of Congress as well as representatives of the rice industry wrote to Clayton Yeutter, Richard Crowder, or members of the USDA Congressional Relations staff inquiring into the status of the Iraq CCC program. (See, e.g., letter from Sen. Thurmond to John Frydenlund, dated March 23, 1990; letter from Sens. Lott and Cochran to Clayton Yeutter, dated April 26, 1990; letter from Sen. Shelby to Franklin Bailey, dated May 10, 1990; letter from Sen. Johnston to Clayton Yeutter, dated June 7, 1990; and letter from Rep. McCrery to Clayton Yeutter, dated June 14, 1990.)

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It is not within my responsibility to address the wisdom of the decision to extend CCC guarantees to Iraq for Fiscal Year 1990, but I do note that McKenzie had intended that the information she supplied the USDA be taken as a caution. In view of the constraints imposed on prosecutors against disclosure of information collected in ongoing investigations, the extent to which McKenzie was able to advise USDA as to Iraqi criminal complicity is uncertain. However, it is clear that there was no doubt in McKenzie's mind that she had provided enough information to allow USDA to understand the Iraqi complicity in Drogoul's schese and that she was unaffected by pressure from any government sources, to the extent there was any, to ease the way for the adoption of Iraq's CCC program for Fiscal Year 1990.

It cannot be urged with any degree of credibility that McKenzie, even if we were to assume some corrupt motive, violated any federal criminal provision in her dealings with the USDA. Her statements to the USDA representatives were truthful, and they did not take place within the juriediction of an agency, as defined in the law, or in any pending proceeding.[95] The USDA did not visit Atlanta in connection with any investigation it was conducting; rather, the informal meeting was held at the prompting of the USDA so that it could gather information in connection with a policy decision it faced.

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[95] Omissions typically lead to criminal culpability only in those instances where there is a requirement of information by statute or official form. See, e.g., U.S. v. Hansen, 772 F.2d 940, 943 (D.C. Cir. 1985), cert. denied, 446 U.S. 902 (1980).

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In any event, I view the evidence to be clear and convincing that McKenzie did not act with any corrupt motive when she met with the USDA. To the contrary, the record shows that McKenzie took great pains to provide the USDA with all the information she could lawfully disclose.

Nor does the Thornburgh letter, and my study of the circumstances surrounding its dispatch, suggested any corrupt motive on Thornburgh's part. The letter has been characterized by some as an effort to hinder the investigative efforts of the Gonzalez Committee. By its terms, the letter sought to prevent disclosure he feared would damage a complex and important prosecution.

I personally deposed Thornburgh, and found that the statements made by Thornburgh to Gonzalez were neither false nor misleading. Thornburgh's desire to protect the prosecution of this undeniably sensitive case is objectively reasonable.

In addition, Thornburgh's concern with national security was to be expected. President Bush issued NSD-26 less than one year earlier. That security directive called for the normalization of relations between the United States and Iraq. At the time Thornburgh wrote his letter, the USAO had made it known that it was targeting Iraqi nationals and focusing on CBI and Rafidain Bank. Even if the letter perhaps overstates his concern, it is still true. I believe that the evidence is clear and convincing that Thornburgh did not act with corrupt intent.

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C. Did The Foreign Policy Of The United States Toward Iraq, As Defined Above, Impact Upon The Government's Investigation and Prosecution?

The answer to this question is clearly "No." I arrive at this answer by several different routes.

First, addressing the continuation of the CCC program, the USAO knew that the USDA and State Department were determined to push through another $1 billion in guarantees for Iraq grain purchases for Fiscal Year 1990. A delegation from the USDA travelled to Atlanta to speak to representatives of the U.S. Attorney's Office, and McKenzie was advised that the Secretary of State considered it very important to U.S. foreign policy toward Iraq that the program be approved. Nonetheless, McKenzie and other attorneys in the USAO, and the DOJ as well, continued to pursue Indictments against Iraqi participants in the CCC program based on evidence that Iraqis might have been criminally involved in Drogoul's "off-book" activities. While information provided by the USAO did not persuade USDA and the State Department to withdraw their support for Iraq's participation in the CCC program -- $500 million in guarantees was actually released prior to the 1990 Gulf War -- neither did the position of USDA and the State Department affect their prosecution. With the exception of the Central Bank of Iraq, which I separately address, the USAO proceeded to indict all appropriate Iraqi interests, including Rafidain Bank, which is state-owned, and the principals of various other entities. The prosecutors did not buckle, and foreign policy considerations did not move them.

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Nor did foreign policy considerations move the USAO not to indict either Wafai Dajani on BNL-Rome. The factual backdrop to these decisions is set forth in substantial length in Section 6 of this Report, and I will not belabor them here. I have seen no credible evidence that either the USAO or DOJ let Dajani's alleged relationships to Jordanians of high station bear on their decision not to seek the return of an Indictment against him on February 28, 1991, even assuming any pressure toward that end had been applied. Similarly, while I am aware that BNL sought a diplomatic solution to the possibility that DOJ would persuade the USAO to include BNL in the Indictment, I have also found no credible evidence to support a charge that BNL's strategy of resorting to diplomatic contacts influenced either DOJ or the USAO in framing the Indictment ultimately returned.

VII. ISSUES RAISED BY JUDGE MARVIN H. SHOOB

Under the terms of my appointment, I am obliged to examine the actions of the USAO prosecution team before Judge Marvin H. Shoob, who presided over the Drogoul BNL-Atlanta prosecution. Judge Shoob has made serious charges against the USAO prosecutors. It is necessary, therefore, that I review their conduct and thus the validity of those charges. At the outset I must state my respect for Judge Shoob, a highly regarded jurist. I have conferred with him in recent weeks and found most helpful his insights into the proceedings. Moreover, I can sympathize with the frustration Judge Shoob must have felt in this matter, given his belief that Drogoul was a tool being manipulated by his

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superiors.

In approaching this extremely sensitive area, I have spoken not only with Judge Shoob, but also with the USAO prosecutors and with Mr. Wade of their Task Force. I have examined all of the transcripts and exhibits of the proceedings before Judge Shoob, and all of the documentation pertinent to the matters before Judge Shoob, as reflected in the files of the USAO and the DOJ.

Against this background I shall examine the conduct of the USAO prosecutors.

A. The Terms And Development Of The Plea Agreement

The denouncement of the Atlanta USAO's efforts to conclude its prosecution of Drogoul occurred at the Sentencing Hearing on September 30, 1992, following thrse weeks of testimony. At that hearing, Drogoul reversed course and sought to withdraw his guilty plea. He also, for the first time, specifically named several BNL superiors whom he claimed had actual knowledge of his "off-book" lending activities to Iraq. The next day, the USAO withdrew its opposition to Drogoul's motion to withdraw his guilty plea and joined the defendant's motion. On October 5, 1992, Judge Shoob entered an Order granting Drogoul's motion and granting the USAO's motion for his recusal (the "October 5 Order") (Ex. 25.)

Judge Shoob's October 5 Order sets forth in some detail his tentative conclusions about the conduct of the investigation and prosecution of Mr. Drogoul, evaluates the USAO's pursuit of facts that might implicate officials at BNL-Rome, and speculates about the role of United States intelligence agencies in that

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pursuit. The concerns expressed in Judge Shoob's October 5 Order were presaged by his questions to Drogoul's counsel and McKenzie at the June 2, 1992 hearing on Drogoul's plea agreement. At that hearing, Judge Shoob expressed surprise that Drogoul had entered a plea agreement over the preceding weekend. Judge Shoob expected Drogoul to plead guilty to all counts of the Indictment and to deliver an extended public statement that he previously requested the opportunity to deliver.

Judge Shoob's comments at the June 2 plea hearing reflect concern that the cooperation the government would obtain under the plea agreement would yield a "sanitized" version of the facts. Judge Shoob said:

> Well, my feeling, as I have enunciated earlier, is that I don't believe that Mr. Drogoul was the only person involved in these machinations . . . I do not want to be in a position where I have to sentence Mr. Drogoul where he takes the fall when there are other people involved who are equally culpable. (Transcript of Plea hearing, June 2, 1992, at 104, attached hereto as Ex. 21.)
>
> A special prosecutor ought to get into this entire matter, because I am not getting the information from Mr. Drogoul, and I am going to get a sanitized version of the sentence. I will have no way of knowing what sort of disclosure he has made to the Government and what is presented to me at the time of sentence.
>
> (Id. at 72.)

Judge Shoob took this position notwithstanding the fact that Drogoul, his counsel and McKenzie all supported the plea

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agreement.[96] In fact, when interrogated by Judge Shoob about his satisfaction with the plea agreement, Drogoul explicitly told the Court that he no longer wanted to make the public statement in Court that he previously claimed he would offer:

> The point I am trying to make, to really discuss a case like this properly I need literally thousands of documents to kind of refresh my memory and to put the pieces together in proper perspective. To be honest with you, I don't think that I could have written a full disclosure in two weeks. It would have taken much longer.
>
> (Id. at 58.)

I do not possess Judge Shoob's intimate familiarity with the proceedings that have taken place before him, or with his assessment of the credibility of Drogoul, his counsel, and representatives of the USAO. However, because I have had the opportunity to review not only the transcripts of the proceedings before him, but also extensive evidentiary documentation, correspondence of counsel, and internal memoranda, I must disagree with Judge Shoob's apparent dissatisfaction with the plea agreement presented to the Court on June 2, an agreement I find extremely favorable to all parties under the circumstances.

The plea agreement required Drogoul to plead guilty to sixty (60) Counts of the Indictment. Those Counts appear to be representative of the 347 Counts of the Indictment and were sufficient to support a life imprisonment term several times over, absent a successful motion by the government for a downward

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[96] The USAO's Response to Judge Shoob's allegations is submitted herewith as Ex. 26.

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departure.[97] As calculated under the Federal Sentencing Guidelines, Drogoul's sentence would have been no greater if he had pleaded guilty to all 347 counts of the Indictment.

The plea agreement also provided for complete cooperation in the form of a detailed debriefing. As set forth in the plea agreement, the debriefing was to be of indeterminate length so that Drogoul would have ample time to review documents to assist him in reconstructing events. The agreement also required Drogoul to participate in a deposition to provide sworn testimony that could be used by the government in subsequent proceedings flowing from the affairs of BNL-Atlanta or against other violators, and that would create a full record under oath for evaluation of any "substantial assistance" motion the USAO might make.

Finally, the plea agreement called for continued cooperation by Drogoul following sentencing, and permitted him the benefit of a motion for sentence reduction under Rule 35 of the Federal Rules of Criminal Procedure should his post-sentencing cooperation constitute "substantial assistance."

The plea agreement reached between the USAO and Drogoul represents a model of fairness to all parties. The agreement is favorable to the government because it achieves the maximum sentence possible under the Indictment; it gives the government complete control over the decision whether Drogoul's cooperation

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[97] Under Section 5K1.1 of the Federal Sentencing Guidelines, the government can make a motion for a downward departure from the relevant sentencing guideline range if a defendant offers "substantial assistance."

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would constitute "substantial assistance"; the debriefing mechanism permits the reconstruction of Drogoul's memory in much greater detail than would otherwise be possible; and the deposition it called for would have created a sworn statement for use in other proceedings, including the sentencing hearing, and against other violators.

The plea agreement was favorable to Drogoul because it committed the government to making a motion for downward departure if he provided sufficient cooperation, putting to rest any fear that the USAO would fail to present the Court with any information Drogoul provided; it allowed Drogoul to be debriefed in detail following whatever time he required to refresh his recollection, thus allaying his concern that his recall would have been inadequate if he were to present only an oral statement to Judge Shoob; and it allowed the creation of a sworn record of his cooperation through a deposition in which he would have been examined on the record by both the USAO and his own counsel, and which would have given him the ultimate protection against concern, if he had any, that the government would not disclose the details of his cooperation.

I would also have thought that the plea agreement was favorable from the Court's perspective, although Judge Shoob did not appear to think so. It would have provided Judge Shoob with an unusually complete record on which to evaluate the extent of Drogoul's promised cooperation. The sentencing record would not be "sanitized", because Drogoul's counsel would have been present at

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the debriefing and would have had the opportunity to examine Drogoul during the deposition to elicit any favorable information not sought by the USAO.[98] As always, Judge Shoob had sole authority to determine whether Drogoul's cooperation warranted a downward departure from the Sentencing Guidelines' range due to substantial assistance.

Thus, I find it unlikely that the process contemplated by the plea agreement would have yielded a "sanitized" story at Drogoul's sentencing.

B. Concern About The "Eleventh Hour" Plea Agreement

Judge Shoob also expressed concern on June 2 that the plea agreement was reached at what he perceived to be the eleventh hour, which, to his mind, cast doubt on the integrity of the negotiations. Judge Shoob said,

> The thing is bouncing all over the place. I am not sure exactly what happened. I don't know why a deal was made this very last minute when all these representations were made that he was going to make a full disclosure at the time of the plea. (Ex. 21 at 94-5) . . . I understand the U.S. Attorney's Office has its own agenda and probably your decisions were brought about by long-term experience in

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[98] The minutes of the debriefing sessions reflect that Ms. Tyler, Drogoul's counsel, was present at every one. When I spoke to her about this, she said she thought this was true, except that she might have missed one or two sessions, but that her investigator was present at those. I have read every page of the debriefing memoranda, and have actually visited the room where Drogoul was given his records and worked on reconstructing the hundreds of transactions involved. Indeed, the walls are covered with his notes reflecting his efforts at this reconstruction. I can assure Judge Shoob that the debriefing minutes I read refute Drogoul's suggestion at his subsequent Sentencing Hearing that through the debriefing, the government had attempted to influence or "sanitize" his version of the events.

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> dealing with these things. All I can tell you is the perception, certainly the public perception and the media perception and my perception was that, when somebody offers to plead to the entire indictment and make a full statement under oath and the government is going to be given an opportunity to present its witnesses at a later date if they take issue with anything the witness has said, the perception is that, when the government cuts some other deal promising certain benefits, that there is some attempt to cover up. (Transcript of Hearing, at 13, attached hereto as Ex. 27.)

In fact, as Drogoul's counsel had explained to Judge Shoob, the plea negotiations had been underway for several months, but without success: "We were negotiating the entire time. We have been negotiating since I have had the case." (Ex. 27.)

As reflected in correspondence between the USAO and Drogoul's then-counsel, Sheila Tyler, the plea agreement was the product of a negotiation that began in earnest May 15, 1992, when little more than two weeks remained before the plea hearing. On May 16, 1992, McKenzie made the initial offer to Drogoul to plead guilty to 60 counts of the Indictment. Letters were exchanged between Tyler and the USAO until May 29, when Tyler advised Chartash, the AUSA who was covering the case during McKenzie's brief absence from the office, that Drogoul was considering the government's offer. After reviewing the proposed plea agreement, Drogoul agreed to it on June 1, 1992. I do not find it surprising that these negotiations did not culminate in an agreement until shortly before the June 2, 1992 scheduled date for the plea hearing. In my experience, it is the rule rather than the

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exception that compromises such as these are achieved only at the eleventh hour.

Judge Shoob also appeared concerned that the government, by "giving" up all but 60 counts of the Indictment, compromised its interests, which he found inexplicable. Moreover, he appeared to object to the participation of Chartash in the negotiation.[99]

As established by the correspondence exchanged between McKenzie and Tyler, it was McKenzie who made the 60 count plea offer that was eventually taken up by Drogoul. Chartash merely implemented it. Moreover, as I have noted, the government lost nothing by agreeing to a 60 count plea because it achieved a maximum sentence anyway.

C. The Sentencing Hearing And October 5 Order

The plea hearing before Judge Shoob was followed by 33 debriefing sessions with Drogoul. The debriefing did not begin until Drogoul spent a week reviewing the documents about which the USAO proposed to question him. Drogoul was represented by Tyler and/or Tyler's investigator, Michael Hutchenson, at all debriefing sessions. The last debriefing took place August 20, 1992. A new attorney, Bobby Lee Cook ("Cook") took over Drogoul's representation about that time, and Drogoul refused further cooperation.

Drogoul's sentencing hearing began September 14, 1992,

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[99] At one point in the proceedings it appeared that Judge Shoob was under the impression that Chartash may have gone directly to Atlanta from the DOJ in Washington to negotiate the plea bargain. I believe this impression was corrected on the record by Mr. Chartash.

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with a week of testimony by witnesses offered by the government. In his opening statement, Cook alleged that the U.S. intelligence agencies and BNL-Rome had known contemporaneously of BNL-Atlanta's unauthorized loans to Iraq, and claimed that the DOJ was engaged in a cover-up for political and foreign policy reasons. The transcript of the proceedings reflects that Cook continued to receive, and make reference to, Congressional statements, CIA documents and other materials throughout the sentencing hearing. (Opening Statement of Cook, September 14, 1992, at 25, 45.) However, it is not clear what specific materials Cook had in his possession to support his references, or how he obtained those materials. The USAO was surprised and disturbed by the Cook's statements.

On September 21, Judge Shoob denied a motion brought by Cook to withdraw Drogoul's guilty plea. In the days that followed, the Court heard testimony from witnesses called by Cook. That testimony is too extensive to recount here, but it is fair to say that at first blush, much of it could have appeared to conflict with previous statements made to the Court by witnesses, other defendants, and Drogoul himself.

For example, on June 2, when his guilty plea was entered, Drogoul testified in a three-hour hearing, and addressing the question of BNL's knowledge, said nothing more specific than that his superiors at BNL-Rome should have known of his unauthorized activities: "They [BNL-Rome] were probably aware that we were exceeding our authority." (Id. at 85.) In response to Judge

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Shoob's question whether "anybody at the home office of BNL was aware of your off book set up," Drogoul stated, "I would say that they were not aware -- not specifically . . ." (Id.)

On September 30, however, Drogoul testified that his conduct was known to and authorized by his superiors. (Testimony of Drogoul, September 30, 1992 at 1713.) Drogoul stated that Pedde, Lombardi, Monaco, and Guadagnini "knew what was going on." (Id.) Drogoul also stated that he told BNL-Rome that if they wished him to continue the business something had to be done with Mr. Sardelli, because Sardelli did not know what was going on. He said that "within the month, a month and a half Sardelli was removed back to Rome." (Id. at 1807.)

Drogoul's reversal posed a problem for the USAO. After considering it overnight, Acting U.S. Attorney Brill addressed the Court the following day to set forth the USAO's position. Brill said the government would join Drogoul's motion to withdraw his guilty plea and requested that the matter be set for trial. She stated that the government was not willing to be part of a sentencing proceeding pursuant to a plea agreement, where the defendant suddenly contended he was innocent. She also informed Judge Shoob that the government would seek his recusal.

Judge Shoob agreed that the matter should be tried, and granted defendant's motion. Judge Shoob also said that he would recuse himself on the government's presentation of a written motion, because he had already reached certain tentative conclusions. Judge Shoob said that his review of the evidence had

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convinced him that BNL-Rome was not a victim (Ex. 25 at 6.) and that its personnel knew or had deliberately shut their eyes to the obvious activities at BNL-Atlanta.

Judge Shoob elaborated on these conclusions in the October 5 Order, in which he said that the evidence presented at the sentencing hearing "raised such serious questions that the Court concluded that these issues could not appropriately be taken up on a motion for downward departure but should be heard at trial." (Ex. 25 at 5.) Judge Shoob appeared to believe that the government withheld information critical to the question of Drogoul's guilt or innocence.

D. Judge Shoob's Specific Charges

Judge Shoob's October 5 Order makes serious charges against the DOJ and the USAO. He said the evidence presented at the sentencing hearing suggested that the USAO had not fully investigated the facts, and suggested that in recognition of that fact, they had joined Drogoul's motion to withdraw his plea. (Ex. 25 at 3-4.) In light of the gravity of these charges, I address below each of the tentative factual conclusions in the October 5 Order. As I have stated, I cannot presume to place myself on a par with Judge Shoob's familiarity with the facts presented at the hearing and his opportunity to evaluate the witnesses' credibility. Nonetheless, and with utmost respect, I find that certain of Judge Shoob's conclusions are not supported by the record at the sentencing hearing or the other evidence I have considered.

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1. The Knowledge of Officials at BNL-Rome

In his October 5 Order, Judge Shoob concluded first that officials at BNL-Rome were aware of and approved Mr. Drogoul's activities. I set forth here each item he identified in support of his conclusion, followed by my own comments.

a. Classified reports from the CIA conclude, in part, that a number of high-level BNL-Rome officials supported Mr. Drogoul's activities.

My analysis of this "conclusion" contains classified information and thus is submitted in Part II of my Report. See also Section V, infra.

b. A senior BNL official, Mr. Monaco, referred an Italian company seeking financing for a major construction project in Iraq to BNL-Atlanta.

The mere fact that Mr. Monaco referred the Danieli Steel Company to BNL-Atlanta for financing of a construction project in Iraq does not suggest to me that BNL-Rome knew or was willfully ignorant of Drogoul's "off-book" and unauthorized activities.[100] There was nothing unusual about the Danieli transaction that would have alerted BNL-Rome to Drogoul's illegal activities. BNL-Rome was aware that BNL-Atlanta had a preexisting relationship with Iraq because BNL-Rome had previously authorized certain CCC transactions through BNL-Atlanta. These prior dealings made BNL-Atlanta a logical choice to finance the project after BNL-Rome determined that it would not be prudent to finance the project in Italy

[100] Again, I point to the four MTLs. The last of these, executed by Drogoul in April 1989, was an agreement for an unsecured loan of $1.155 billion to Iraq on terms unfavorable to BNL, at a time when BNL was rejecting Iraqi requests for loans unless they were fully collateralized.

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through the Rome branch.[101]

c. The former head of BNL's North American operations, Dr. Luigi Sardelli, provided credible testimony showing that senior officials in Rome approved or had knowledge of Mr. Drogoul's activities.

Judge Shoob characterizes Dr. Sardelli as a "straight-shooter" (see 3(b) below). I have reviewed Dr. Sardelli's testimony and have concluded, as did the drafter of the Italian Parliamentary Report, that he is, at best, evasive and nonresponsive. For example, the Italian Parliamentary Report notes:

> In his first hearing before a delegation of the Committee (November 1990) Sardelli denied:
>
> 1. having read the final report of the auditor Messere;
>
> 2. that he knew that the BNL Atlanta office had a clearing account with the Morgan Bank;
>
> 3. that he knew that the BNL Atlanta office had close relations with Iraq.
>
> Subsequently it was established that:
>
> as regards point 1, the final Messere report was signed also by Dr. Sardelli;
>
> as regards points 2 and 3, from communications sent to him personally, Dr. Sardelli had been made aware of these facts.
>
> (Ex. 20 at 91.)

Moreover, none of the points in Sardelli's testimony to

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[101] As implesented by Drogoul, however, the transaction was collateralized by BNL's own funds. There is nothing to suggest that Monaco was aware of this highly undesirable feature of the transaction. In fact, the evidence I have reviewed is to the contrary. A more detailed discussion of the transaction is set forth at Section V, supra.

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which Judge Shoob refers establishes BNL's awareness or approval of Drogoul's activities. In fact, Sardelli testified that he had no personal knowledge that anyone outside BNL-Atlanta was aware of Drogoul's "off-book" activity, and that he was convinced by Drogoul's statements that nothing unauthorized was occurring at BNL-Atlanta. (Testimony of Sardelli, September 29, 1992, at 1558.)

(i) Sardelli's letter criticizing defendant's activities was never delivered by the auditor to officials in Rome.

The fact that Sardelli's letter was never delivered does not indicate to me that BNL-Rome knew of Drogoul's activities. Sardelli's letter does not detail any of Drogoul's "off-book" commitments to Iraq. Even if it did, it could have alerted BNL officials in Rome only if it had been delivered.

(ii) Instead of auditing or investigating BNL-Atlanta, BNL-Rome officials elected to investigate Dr. Sardelli who appears to be the only "straight-shooter" in the organization.

As noted above, I question Judge Shoob's characterization of Sardelli as a "straight-shooter." In addition, based on the evidence I have reviewed, Judge Shoob is incorrect in his assertion that BNL-Atlanta was not audited by BNL-Rome auditors. BNL-Rome auditors did not audit Atlanta because when they were in the United States, Messere already had an audit of BNL-Atlanta underway, and BNL-Rome decided not to duplicate the effort. (Testimony of Sardelli, September 29, 1992, at 1559-60.) It should also be noted that it was Messere's audit report that caused BNL-Rome to require regular audits to be conducted of BNL-Atlanta to guarantee compliance with U.S., Italian, Georgia and BNL banking practices,

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policies, and procedures.[102]

> (iii) BNL-Rome was an extremely political organization operating more as an agency of the Italian government than as a bank.

Whether BNL-Rome is a political organization or a bank does not bear on whether BNL-Rome knew or approved of Drogoul's off-book activities. It is true that BNL is largely state-owned, but I find this unremarkable. I do not believe that one bank would have deliberately risked the large, predictable losses encountered on the "grey book" loans, at the low spreads and fees charged, even for purposes of public policy or the possibility of political gain.

> (iv) Dr. Sardelli voiced his frustration with BNL-Rome in testifying that the BNL-Rome officials sent to the United States to investigate the Atlanta branch after the raid were the officials who should have been investigated.

Sardelli's statement that the officials inspecting BNL-Atlanta were the ones who should have been inspectad appears to be based on the erroneous assumption that managers or officials from the head office were inspecting BNL-Atlanta. (Testimony of Sardelli, September 29, 1992, at 1603). The BNL-Rome Inspectorate Division, which I understand to be wholly independent, inspected BNL-Atlanta, and not the managers and officials from the head office. (Id.)

> (v) Dr. Sardelli testified that he believes officials at BNL-Rome knew of Mr. Drogoul's activities.

Although Sardelli said that he believed someone at BNL-

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[102] See also, Section V, supra, where the many audits of BNL-Atlanta are described.

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Rome must have known, he did not offer any direct or circumstantial evidence of BNL-Rome's knowledge or complicity in the scheme. In fact, he made it clear that he never had any conversation with anyone at BNL-Rome or BNL-New York that revealed authorization of Drogoul's "off-book" landing. (Testimony of Sardelli, September 29, 1992, at 1558.)

d. There is evidence that documents may have been shredded by BNL officials shortly after the raid and that some files and documents are missing.

I have no reason to believe that following the raid on BNL-Atlanta bank, documents were shredded or that files and documents are missing. Representatives of the FBI, New York and Atlanta Federal Reserve, Georgia Department of Banking and Finance, BNL's Italian Regulatory Authority, the Bank of Italy, and BNL's management were on the bank's premises shortly after the search. Any destruction or shredding of pertinent bank records or files, therefore, would have had to have been conducted in the presence of these investigators and regulators. Although Von Wedel claimed that Messere shradded bank documents following the execution of the warrant on August 4, 1989, Von Wedel also testified that he had reviewed the files he thought might have been shredded and found nothing missing. (Testimony of Von Wedel, September 24, 1992, at 1224.) This issue has been amply investigated by the USAO, and it does not appear that there is any credible evidence that this event actually took place.

e. BNL branches in Germany, England and Canada were aware of BNL-Atlanta's substantial financing of Iraqi purchases and projects.

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As I stated previously, BNL-Rome was aware that Drogoul had dealings with Iraq, and I am convinced that this relationship may well have been known to other BNL branches such as BNL-Germany, BNL-England, and BNL-Canada. This knowledge, however, does not support the conclusion that they all knew of Drogoul's "off-book" unauthorized activities at BNL-Atlanta, or the $2 billion in MTLs. The Task Force interviewed officers of BNL-Germany, BNL-London, BNL-Canada and BNL-Rome. These interviews show that the "off-book" activities of BNL-Atlanta had been effectively concealed.

f. The Government's witnesses from Morgan Guaranty and the Bank of New York and confidential CIA reports concluded that it was well-known in international banking circles that BNL-Atlanta provided substantial financing for Iraq's purchase of agricultural, military and non military products.

Based on my reading of the testimony of William F. Williams, Bank of New York, and Francis J. Cole, Jr., Morgan Guaranty Trust Company, I must respectfully disagree with Judge Shoob's observation concerning the testimony of these witnesses. In fact, their testimony is to the contrary:

> By the Court:
>
> Q. Let me ask you this, Mr. Williams. Having been involved in international banking circles as long as you have, was it well-known in 1986, '87, '88 that the Atlanta branch of BNL was involved in substantial financial transactions with Iraq?
>
> A. No. I was never aware that they were involved specifically with Iraq. As I said, we became aware that they were involved or active in financing CCC. I don't recall whether, specifically, we were aware of Iraq. There was not general knowledge as you describe it.
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(Testimony of Williams, September 22, 1992, at 734.)

Francis Joseph Cole, Jr., testified in like manner:

> Q. Now, was there anything the BNL-Atlanta clearing account that alerted you or anyone else at Morgan to anything unusual or unauthorized in its nature?
>
> A. No, ma'am.

(Testimony of Coles, September 22, 1992, at 747-48.)

* * *

> Q. And prior to August of 1989 did anything about the BNL-Atlanta account cause talk within your institution?
>
> A. Not at all.
>
> (Id. at 757.)

g. The Italian Parliament's extensive report on the "BNL scandal" concludes that Mr. Drogoul was not a "lone wolf" and that BNL-Rome's failure to adequately supervise the Atlanta branch permitted the continued illegal activity.

As Judge Shoob notes, the Italian Parliamentary Report criticizes senior BNL-Rome officials for inadequately supervising and auditing BNL-Atlanta. It also suggests that BNL tolerated Drogoul's activities. As I have noted before, although BNL may have known that Drogoul had exceeded his authority in certain activities, I cannot believe BNL would have condoned the MTLs.

h. Mr. Drogoul's co-defendant Paul Von Wedel and Jean Ivey, a BNL-Atlanta employee who was granted immunity, testified that they believed that officials in Rome were aware of BNL-Atlanta's involvement with Iraq -- testimony the Court found credible. Mr. Von Wedel also testified that Mr. Drogoul had regular access to Dr. Giacomo Pedde, the director general of BNL, that Mr. Drogoul met with Mr. Monaco, a senior BNL official, in Baghdad,

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and that Mr. Florio, another senior BNL official, verbally approved early CCC loans to Iraq.

I share Judge Shoob's concerns that many of Drogoul's recent allegations about his relationship with BNL-Rome suggest that BNL-Rome "should have known" of certain of his activities. However, I believe that his allegations establish nothing more than an area calling for further investigation. Although Von Wedel and Ivey suggest that someone at BNL-Rome must have "known," to date neither Von Wedel, Ivey nor any other BNL-Atlanta employee has provided any direct or circumstantial evidence of BNL-Rome's knowledge or complicity in Drogoul's scheme.[103] Now that they have received immunity, they have no reason to withhold information.

i. Mr. Drogoul's first attorney, Theodore Lackland, testified credibly that several individuals involved with the allegedly fraudulent transactions told him that officials in Rome were aware of the transaction and in fact had in their possession one of the allegedly fraudulent loan agreements (MTL-4).

I have to give little weight to Lackland's testimony that employees at BNL-Atlanta told him that they believed BNL-Rome knew of BNL-Atlanta's activities. These employees have not come forward and testified as to BNL-Rome's awareness of Drogoul's activities based on their personal knowledge. Indeed, several testified that they assisted Drogoul in concealing the loan transactions from Rome and the Italian and U.S. bank regulators,

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[103] I have set forth at length in Section V, supra, Von Wedel's repeated statements, in response to the Court's questions at Von Wedel's plea hearing, that BNL-Atlanta's "off book" activities were not authorized.

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which is inconsistent with a belief that BNL-Rome was aware of the scheme. Moreover, Bruce Kirwan, an attorney for BNL, had already testified at an earlier proceeding before the Court that BNL did not have MTL-4. Lackland's hearsay testimony should not outweigh this.

> j. As the "victim" in this matter, BNL-Rome may be able to recover $1-2 [sic] billion in unpaid CCC-backed loans to the Iraqis.

The Indictment generally alleges that defendants defrauded the CCC by issuing standby letters of credit, in connection with the CCC Export Enhancement Program, in excess of amounts authorized and representing to the CCC that BNL-Atlanta was a bank qualified to issue such letters of credit (Counts 225-40, 45); registering a commodity sale in excess of the true port value (Counts 222-224); and falsifying two CCC payment guarantees (Count 245). The CCC, however, did not suffer any losses with respect to these transactions because the standby letters of credit and the falsified payment guarantees lapsed, and all payments were made on the commodity sale registered in excess of its port value, before there was any loss claimed against the CCC. Therefore, whether BNL is the "victim" or the "villain" is irrelevant here because the CCC has not suffered any losses as a result of the alleged frauds.[104]

> k. When notified of the [sic] August 4, 1990, raid, Mr. Drogoul returned immediately to the United States, leaving his family in France. He met with BNL officials in New York, was furnished an attorney who was to ba paid by the bank, and

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[104] Judge Shoob incorrectly states that $1-2 billion is the amount of unpaid CCC-backed loans. The actual amount is $347 million.

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continued as manager of the Atlanta branch for a week.

In my opinion, Drogoul's return to the United States does not suggest that BNL-Rome knew of or participated in his illicit activities. Indeed, his return was not immediate. He first stopped in London to confer with his Iraqi contacts who instructed him to return to Atlanta to maintain the appearance of normality. A passage in which he describes his Iraqi meeting is worth quoting at length, because it addresses Judge Shoob's point:

> In retrospect, Drogoul sees that he was again manipulated by the Iraqis for their own purposes when they urged him to immediately return to the United States to do damage control and give the appearance of normalcy after scheme deletion on August 4, 1989. This occurred when Drogoul immediately called Taha in London when he learned of the August 4th search of BNL-Atlanta while vacationing in Paris. At Taha's urging, Drogoul flew from Paris to London arriving on Saturday night some 15 hours after his call to Taha. By this time Ali was also present. Drogoul skipped dinner and went directly to Ali's room where he, Ali, Taha and Fidel Jawad Kahdum, the attorney for the Iraqi Ministry of Industry and Military Production, met for a number of hours. Ali was on the phone to Baghdad at least 25% of the time. The ultimate conclusion of the Iraqis -- which Drogoul had already reached himself but not shared -- was that Drogoul's presence in Atlanta would help with damage control, give more appearance of normalcy than had Drogoul become a hunted fugitive and hopefully encourage continued funding under the unused portions the MTLs . . . The Iraqis were quite upset when Drogoul's return did not alleviate altogether their problems arising from the BNL-Atlanta scandal which they perceived as interfering with getting the additional $1.2 billion in CCC guarantees they sought in Octobar 1989.
>
> Although Ali was often coarse and not always as subtle as others in the Iraqi network, such

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> as Taha, he was a successful manipulator in his endeavors with Drogoul including obtaining the ever increasing MTLs in ever increasingly [sic] frequency and magnitude, distracting Drogoul from the increasingly evident conclusions that MTL purchases were for non-civilian usage and finally convincing him to return to the United States after the events of August 4, 1989 without disclosing Iraqi criminal complicity in the schems to defraud BNL-Atlanta. (Memorandum of June 23, 1992, Drogoul Interview.)

It should also be noted that at the time of the search, the nature and scope of the fraud had not been established. The fact that BNL-Rome did not immediately fire Drogoul and, in fact, initially offered to provide him with counsel is, in my view, more indicative of the uncertainty of the situation than of BNL-Rome's complicity.[105]

1. Mr. Drogoul's chief mentor at BNL in 1986-87 retired from BNL in 1987 and became a consultant at Entrade, a defendant in this case and a participant in the scheme.

Mr. Guadagnini's acceptance of a consulting position at Entrade subsequent to his retirement at BNL raises some questions. I believe that both Drogoul's own statements, and the information provided by Pamela Prosser, go far to address them. In the written statement he prepared for his attorneys, Drogoul explained that he began the practice of "skipping" loans off the books to hide transactions from Guadagnini:

> During my visit to Venice, our Regional

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[105] Minutes of the August 11, 1989, BNL Board of Directors meeting state that Drogoul was "temporarily laid off without pay" on this date. Thereafter, according to meeting minutes dated September 6, 1989, Drogoul was discharged from employment as of the September 6 board meeting.

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> Manager Mr. Guadagnini was criticized by his superior for allowing the Atlanta Branch to maintain a considerable excess for Rafidain Bank . . . My regional manager sat down with me there and told me to clear up the problem.[106]
>
> Upon my return to Atlanta, Paul, Therese, Robert, Mela and I decided that the best way to handle the situation would ba to skip the excess amounts off the books on the last day of the month, i.e., on the day tha computer reports were examined by Rome.[107]

(Ex. 16 at 4.)

Thus, it is unlikely that Guadagnini could be charged with complicity in Drogoul's scheme. Moreover, Prosser, an Entrade employee, stated that Guadagnini had no decision-making responsibility at Entrade, and was kept isolated from the BNL-Atlanta transactions once he arrived. To that extent, Drogoul's testimony at the sentencing hearing implicates Guadagnini in the BNL-Atlanta schems on new grounds, however, I do think that further investigation of his knowledge is warranted.

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[106] Indeed, Drogoul was repeatedly warned that formal authorization from Rome was mandatory even for loans guaranteed by the U.S. Government (i.e., CCC) and that approved credit lines could not be exceeded.

[107] Because of this "skipping" (or "slippage," as it was sometimes referred to by BNL-Atlanta employees), Drogoul felt comfortable in assuring management that his Fiscal Ysar 1985 $100 million CCC authority had never been exceeded:

> Total $93,206,495.61 [CCC for Iraq Rafidain] We wish to point out that these figures have been triple checked by us and that they reflect our outstandings under this facility. The final maturities are accurate. Previous reports, which have required that we reflect manually month by month maturities under each loan, were not accurately reflected. We apologize for this error. (Ex. 3.)

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2. The Investigation and Prosecution of Mr. Drogoul

In the October 5 Order, Judge Shoob also charged that the USAO's failure to investigate seriously whether BNL-Rome knew of Drogoul's activities was "coupled with or provoked by the involvement of other departments of the United States Government [which] indicates an effort to absolve BNL-Rome of complicity in the Atlanta branch loans to Iraq." (October 5 Order at 9-10.) Specifically, Judge Shoob charged that DOJ was steering the USAO's conduct of the case and that, in turn, DOJ was improparly influenced by the Department of State and others. (Id. at 14.)

As set forth above, I have exhaustively reviewed the facts relevant to the suggestion that the DOJ directed the USAO's prosecution, and to the further suggestion that other agencies or branches of the U.S. Government improperly interfered with DOJ and/or the USAO in the conduct of the case. I do not reach the same conclusion. In fairness to Judge Shoob, presumptuous though it may be, I venture to suggest that had he been able to review the same materials, he would conclude as I did. I find Judge Shoob's specific charges against the USAO, and his concern about the interference of other agencies, to be inaccurate. I will address briefly his specific charges, however, which are as follows:

a. High level officials in the Justice Department and the State Department met with the Italian Ambassador to discuss the case. They appeared to help steer this case and gave support to BNL-Rome's position that it was a victim in this matter, assuring the ambassador that there "would be no surprises" for the Italians.

I have interviewed the people involved in this matter in

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the DOJ, the USAO and the Department of State, including a number of high ranking officials. All unequivocally and consistently stated that no political or improper pressure had been brought to shape this case. Representatives from the USAO have explicitly stated that they felt "absolutely no pressure" to alter their investigation or prosecutive decisions, and that their office was not denied access to the information it needed to conduct a thorough investigation.[108] My investigation has revealed that the only "pressure" placed on the USAO was the DOJ's insistence that the USAO fully investigate all aspects of this case, and that they not foreclose the possibility that BNL-Rome was involved in the Atlanta lending scheme.[109] Therefore, notwithstanding what may have occurred at the upper reaches of the Italian and American governments, I have found that the course of the investigation was not improperly influenced.

b. The Justice Department cancelled investigators' necessary trip to Italy and Turkey, where they intended to interview bank officials and others with knowledge of the transactions and schems.

My investigation shows that the Justice Department did not cancel any tripe to Italy or Turkey by the investigators.

(1) Turkey: The USAO had planned to go to Turkey in January 1990, to obtain the testimony of Yavuz Tezeller pursuant to a plea agreement with his employer, Entrade International, Ltd. It

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[108] My own experience teaches me that if the USAO prosecutors had felt any pressure, one or more of the many members of their Task Force would have (a) suspected it and (b) disclosed it.

[109] As explained above, the only "Indictment decision" made by the DOJ was to drop the CBI as a defendant.

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was thought that his testimony would provide information about transactions in which BNL-Atlanta engaged. DOJ asked the USAO to delay the trip because it felt that further investigation of the BNL-victim theory was necessary before the trip proceeded. By May 1990, when DOJ ultimately gave permission for the trip, Tezeller had decided to withdraw his offer to cooparate, and the trip became unnecessary.

(2) Italy: According to USAO, the planned trip to Italy became unnecessary because BNL-Rome agreed to bring its representatives and documents to Atlanta.

> c. The Italian ambassador met with then-Attorney General Richard Thornburgh in the Spring of 1990 and told him that incriminating BNL-Rome in these transactions would be tantamount to "a slap in the face" of the Italians and would not be understood by the government in Italy.

As I have noted, I have taken Mr. Thornburgh's sworn testimony. He does not recall such a conversation, but he is firm on the subject that he did not exert any pressure on the DOJ other than to move the case along.

> d. The local prosecutor in this matter received one or more highly unusual and inappropriate telephone calls from the White House Office of Legal Counsel about this, indicating the potential embarrassment level of the case.

Although McKenzie did receive at least one telephone call from Jay Bybee, Associate Counsel in the White House, Bybee has stated that the call was placed solely to gather publicly available information about the status of the BNL investigation that was relevant to the decision whether to extend additional CCC guarantees to Iraq. McKenzie states that this call had no effect

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on the investigation, and I have seen no other evidence that this might have been so.

e. The draft indictment was delayed by the Justice Department from early 1990 until the end of the Gulf War, February 1991 -- almost one year. Also, the plea bargain in which Mr. Drogoul agreed to plead guilty to only 60 counts rather than 347 and initiated by an assistant prosecutor when the chief prosecutor was out of the city effectively silenced Mr. Drogoul who had announced his intention to make a full disclosure at the plea hearing.

Earlier in this Report I set out in detail the month-by-month handling of the BNL matter from August 1989 to July 1991. My investigation shows that the only "delay" occasioned by the Justice Department (or by any other outside Department or Agency) was the delay that resulted from the DOJ's insistence that the USAO conduct a thorough investigation and fully consider the possibility that BNL was in complicity with Drogoul. I also find that the time frame within which the Indictment was brought -- approximately 18 months after the initial search of BNL-Atlanta -- was entirely reasonable considering the complexity of the underlying transactions and the scope of the investigation this case required.

My views as to the fairness and validity of the plea agreement, and manner in which it was reached, are also set forth in this Section, supra.

f. The Government failed to produce and, apparently, made no effort to bring in any knowledgeable bank official from Rome -- including Pedde, Guadagnini, Monaco, Florio -- for the Sentencing Hearing.

I view this decision as a valid exercise of prosecutorial discretion. This was a sentencing hearing, not a trial, and some

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constraints on the scope of he hearing were appropriate.[110] Two of these witnesses reside in Italy and are not within the subpoena power of the U.S. court. Had they agreed to appear voluntarily, it is likely they would have done so only at the government's expense. The two witnesses who reside in New York were, of course, available to the defendant, too, had Mr. Cook chosen to call them.

> g. The Government failed to interview Wafai Dajani, despits evidence of his substantial involvement with the scheme, when he was in Atlanta and had agreed to meet with the prosecution. Mr. Dajani, who has ties to the King of Jordan, was not indicted.

I take this charge to suggest that Wafai Dajani, had he been interviewed, would have implicated BNL-Rome in Drogoul's activities. The USAO has been interested in Dajani for some time. Just prior to his repudiation of his plea agreement, Drogoul had begun in his debriefing sessions to report his conversations with Dajani, which suggested some leads to BNL-Rome's knowledge. (Memoranda of Drogoul Interview, Auguat 18 and 20, 1992.) Those debriefing sessions, however, were terminated by Drogoul. This limited information should be pursued, for it could lead to BNL-Rome, Dajani himself, or both. In any event, as I have noted before, the decision not to indict Dajani was baeed on the insufficiency of the evidence, not on any perceived political or

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[110] I would have been very troubled by this decision if the proceedings had been a trial on the guilt or innocence of Drogoul. Here, however, he had admitted everything, including that his actions were unauthorized. The USAO did have an obligation to show the Court the details of Drogoul's acts, which they attempted to do through Wade's teetimony. The Italian witnesses would have been unable to describe the transactions. Aside from Wade, only Drogoul was in a position to do so.

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other ground.

h. Investigators were blocked by the Department of Agriculture from interviewing Iraqi officials who were in the United States negotiating CCC guaranties and later were prohibited from travelling to Iraq to interview potential co-conspirators and witnesses.

There is no evidence that USDA prevented investigators from interviewing Iraqi officials. In February 1990, Mueller spoke with McKenzie about a USDA proposal that the State Department approach the Iraqi government to allow U.S. government officials to interview Iraqi nationals in connection with the BNL investigation. At that time, USDA was attempting to determine whether to extend further CCC credit guarantees to Iraq, and had launched its own regulatory investigation. The two agencies planned to cooperate in interviewing the witnesses. DOJ wrote to the Department of State proposing that the issuance of CCC credits be conditioned on Iraqi cooperation. McKenzie later expressed concern at this proposed linkage, as well as the wisdom of USDA's plan to provide the Iraqis with a list of their questions in advance. Although USDA representatives went to Baghdad for the interviews, the USAO decided not to pursue the matter. According to McKenzie, the USAO was convinced that the Iraqis would deny complicity but then characterize their meeting with the USAO to be "cooperation" entitling them to the additional $500 million in credits. The USAO decided that such a tradeoff would not be worthwhile, and on that ground made the decision not to travel to Iraq.

i. In early 1990, Atlanta prosecutors met with BNL-Rome lawyers, discussing the bank's position as a victim.

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I understand this comment to suggest that there was a relationship between the USAO and BNL-Rome that did not allow the USAO to maintain its independence in analyzing the case. After the USAO had begun to pursue the BNL victim theory, the prosecutors reasonably found it important to consult BNL concerning the extent of the harm suffered. This meeting does not reveal any intent on the part of the USAO to absolve BNL-Rome of complicity in the loan scheme, nor did I find any evidence to suggest that the prosecutors otherwise acted inappropriately in their dealings with BNL-Rome.

j. The American Ambassador to Italy notified the Secretary of State, Justice Department and others in the Fall of 1989 that BNL's management was worried about the prosecution of the case and wanted it raised "to a political level" and to achieve "damage control."

I find it unremarkable that BNL-Rome, which is almost wholly-owned by the Italian Government, would employ whatever diplomatic channels it had available to prevent publicity that could damage its position in the international banking community. It is obvious that any efforts it made to avoid publicity failed profoundly. In any event, as I have now noted several times over, there is no evidence that any political or diplomatic contacts influenced the prosecution of this case.

k. Matrix Churchill, an Iraqi front company that was a clearinghouse for weapons procurement, was not indicted, although one of its officers was.

This issue is discussed in Section V above. As I noted there, the decision not to indict Matrix Churchill was a reasonable prosecutorial judgment.

l. The Government has provided no credible explanation

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for its failure to indict Wafai Dajani, Matrix Churchill, Enka, and the Central Bank of Iraq.

The decision of the USAO not to indict Wafai Dajani, Matrix Churchill and the Central Bank of Iraq have been discussed in detail above. See Section V, supra. The USAO did not indict Enka, the parent company of Entrade, because there was insufficient evidence. However, once Entrade pleaded guilty and began cooperating, documents and testimony became available through the Entrade plea agreement. Enka came forward and provided witnesses pursuant to a cooperation agreement. At an October 22, 1992, conference in Judge Shoob's chambers, Judge Shoob indicated that his concerns about Enka involvement in the scheme to defraud were satisfied by the explanation offered by Entrade's attorney.

3. Intelligence Agencies and Classified Information

Judge Shoob's October 5 Order, in Parts C and D, raises questions regarding the U.S. Intelligence Community's awareness of BNL-Atlanta's relationship with Iraq. He also asserts that USAO may have been denied access to classified information that could have provided evidence in the case. Judge Shoob's concern appeared to derive from the fact that during the Drogoul sentencing hearing, on September 23, 1992, the USAO presented Judge Shoob with CIA cablas. Judge Shoob believed that the cables suggested "that BNL-Rome was aware of Mr. Drogoul's activities and was not a victim of the alleged fraud," (Ex. 25 at 4.) and that the prosecutors may have been "blocked by agencies with political agendas from developing a full picture of the affair." (Ex. 25 at 13.)

Having received tha clearances necessary to review

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classified information in the course of my investigation, I am not at liberty to disclose in this Report that classified information, even though some of the information may have been publicly disclosed by others. I prepared an unclassified description of the events I am able to discuss, which is set forth as Section X of this Report.

That summary explains that while the channels for dissemination of intelligence information are imperfect, particularly within DOJ, there is no indication that these channels were deliberately blocked to prevent the DOJ or the USAO from reviewing any intelligence information. In fact, Task Force representative Art Wade reviewed classified documents in December 1990 or January 1991, before the Indictment was returned, and those documents had been obtained by DOJ and made available to the USAO before then. Wade reviewed intelligence information again on September 13, 1991, then with U.S. Customs Agent Richard Horton, and McKenzie, Chartash and Wade reviewed cables on April 30, 1992. While some of these intelligence reports do discuss whether "BNL-Rome knew," the USAO representatives did not find them convincing, and I am convinced that the USAO made its prosecutive decisions wholly independent of the contents of this intelligence.[111]

Judge Shoob appears to suggest that intelligence community awareness of BNL-Atlanta's commercial relationship with

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[111] The DOJ was championing the view that BNL might not be a victim when it received the cables. Presumably it would have been eager to share the intelligence information with the USAO had the information tended to show BNL complicity.

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Iraq is surprising. However, the Middle East Economic Digest article demonstrates that in banking circles, at least, BNL-Atlanta was well-known for its transactions with Iraq under the CCC guarantee program. In any event, I do not see why this awareness is relevant to the prosecution of Drogoul.

Having had the opportunity to review a vast amount of material related to the Drogoul presentation, I find no evidence that the USAO sought to provide a "sanitized" version of the facts. The USAO's sentencing hearing at that hearing accords with the evidence as I know it; Drogoul's statements do not. Moreover, as set forth above, any suggestion that the Drogoul prosecution was steered by the DOJ or any other agency is unfounded.

4. Assessment of Drogoul

In concluding my examination of Judge Shoob's charges against the USAO and the DOJ, I think it appropriate to provide my assessment of Drogoul. Obviously his credibility is a critical element in evaluating whether the USAO and the DOJ proceeded properly in this matter, and in the future as a witness.

Drogoul's credibility is vulnerable. Von Wedel, who knew him best, confirms this. In his dozens of debriefings, Drogoul contradicted himself repeatedly and freely admitted that he repeatedly lied his way out of situations where the truth would have revealed his scheme: to the Iraqis, to Von Wedel, to the BNL auditors, to Peat Marwick, to BNL branch managers, to Sardelli, to Guadagnini, to Monaco, to his lawyers, to debriefing agents, to the USAO, and to the Court. Thus, in the discussion that follows, I do

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not suggest, in contrasting his statements and positions at one time with those at another time, where the truth is to be found.

The record is replete with Drogoul's admissions that, during the period of the scheme at issue, he lied to BNL personnel in Europe, the Regional Office in New York, and in his own branch as to what he was doing. There were numerous audits in 1986-1989 by BNL internal auditors, governmental auditors from the Federal Reserve, General Accounting Office and the State of Georgia, and "external" auditors from Peat Marwick. Drogoul fooled them all at each point when he was about to be caught in his scheme.

When the house of cards collapsed on August 4, 1989, Drogoul, who was in Paris at the time, did not return directly to Atlanta as he persuaded Judge Shoob to believe. He went to London, to an emergency meeting with high-ranking Iraqis, to discuss what course he should take. They met, and Drogoul was directed to return to Atlanta.

Immediately upon his return, he agreed to meet with prosecutors, investigators, auditors and BNL and Bank of Italy officials. Among his answers to their questions were the following:

-- He had returned to Atlanta of his own free will, uninfluenced by the Iraqis.

-- The Iraqis did not know the loans were unauthorized; they believed they were approved by Rome.

-- The MTLs were unauthorized and unapproved by Rome.

-- He, Drogoul, had not been bribed nor had he taken any pay-offs, but Von Wedel had.

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Later he was to state:

-- He had gone to London to determine what the Iraqis wanted him to do.

-- The Iraqis knew the MTLs were not authorized. He had told them that directly and also through Dajani. They had manipulated him into returning to Atlanta so that the MTL loan agreements could be drawn upon (the last one, MTL-4, for $1.155 billion had just been agreed to in April 1989 on behalf of BNL by Drogoul).

-- Drogoul had been bribed.

Similarly, Drogoul claimed during a press interview in late March or early April of 1992, that BNL-Rome knew the "gist" of his activities at BNL-Atlanta. This interview was reported in Il Manifesto, an Italian publication. While acknowledging that Monaco "was aware of almost everything [BNL-Atlanta was] doing," Drogoul contended that Sartoretti, Croff, and others whom he declined to name, also knew.

Additionally, Drogoul stated that if BNL-Atlanta had been provided with "just a little more time," the transactions would have been approved by BNL-Rome and put on the books. According to Drogoul, the purpose of the "grey books" was not to deceive BNL-Rome, but to defend Drogoul and others at BNL-Atlanta against Sardelli, BNL-Atlanta's Manager of North America. When Pedde visited the U.S. in October, 1988, Drogoul allegedly told him to get Sardelli "off [his] back." Sardelli left BNL shortly thereafter.

Yet, two months later, in June of 1992, Drogoul pleaded guilty to 60 counts of an Indictment premised on the theory that BNL-Rome was a victim, and stated before the Court that he did not

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think his superiors knew of his "off book" activities.

The only element of the early recitation that did not change in the many debriefings in 1989, his 122-page statement of September 1989 he gave to his lawyers, his conferences with his attorneys, his statements to the Court when he pleaded guilty to defrauding BNL by his "unauthorized" activities, and in his numerous debriefing sessions following entry of his guilty plea, was that his "off book" or "grey book" activities had not been authorized by his superiors.

How do I account for his decision to change course? I can only speculate. His attempt to explain away his earlier statements by claiming that the government had pressured him to say his activity was unauthorized is utter nonsense to anyone who has read all of the debriefing memoranda, as I have. Does he contend that the government, at an early debriefing, pressured him to say he told the Iraqis the MTLs were unauthorized? Does he contend that the government was pressuring him when he composed his 122-page statement for his lawyers, or when he sat with Williams & Connolly, or when in open Court on June 2, 1992, he pleaded guilty to unauthorized activity? Finally, having sat for well over twenty days of debriefing -- with his attorney, Sheila Tyler and/or her investigator present -- does he contend that they sat quietly while the government told him what to say?

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VIII. ALLEGATIONS LODGED BY CONGRESS AND THE PRESS

Legislators and the press have lodged various charges against the DOJ and the USAO for conduct indirectly related to the BNL matter. My treatment of them is set forth below. Excluded from the discussion which follows is the subject of the handling of intelligence information, a subject treated at the close of this Report.

A. Allegations of Improprieties Inside the Justice Department

1. Improprieties In Response To The Gonzalez Committee Subpoena Requests

Representative Gonzalez has alleged that "[a]t the request of the [DOJ] the Federal Reserve withheld hundreds of BNL-related documents" from the Gonzalez Committee. (Testimony of Rep. Gonzalez before the Gonzalez Committee on the Judiciary, June 2, 1992, at 27.) Representative Gonzalez also alleged that after his own Committee "was forced to subpoena the documents, the Federal Reserve, at the insistence of the Justice Department, redacted in whole or in part over 80 of these documents." (Id.) According to Chairman Gonzalez, "[t]he unredacted versions clearly showed that the Justice Department was seeking to thwart the committee's investigation or to withhold information embarrassing to the administration." (Id.) In my review of the materials, I have found nothing that indicates that the DOJ acted improperly in giving advice as the Federal Reserve decided whether to redact or withhold certain documents before turning them over to the Gonzalez

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Committee.[112]

On October 3, 1990, Chairman Gonzalez requested that the Federal Reserve produce to his Committee documents relating to BNL. Two days later, Urgenson prepared a memorandum confirming his telephone conversation with Virgil Mattingly ("Mattingly") of the Federal Reserve, in which he told Mattingly that DOJ "could not advise him to withhold production of the documents." Urgenson made it clear to Mattingly that while "the request may be unduly oppressive and burdensome in light of the number of documents sought and the short time for production [the] decision on compliance should be made on advi[c]e of Federal Reserve Counsel." Mattingly responded that the Federal Reserve did not intand to produce the documents on Friday, and that he did not want to take any steps that would interfere with the [DOJ] Investigation. Urgenson then said that any advice DOJ gave "regarding production would have to mada after review of the request and would concern specific iteme."

It appears that Urgenson and Mattingly spoke again on October 10, 1990. Mattingly advieed that he had propoeed providing the Committee with copies of the Federal Reserve examination report after deleting references to the criminal investigation. Mattingly asked that a Fraud Section attorney review the report and other

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[112] Chairman Gonzalez refers specifically to four redacted documents that apparently demonstrate the impropriety of DOJ's conduct or advice.

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documents that were covered by the Committee's request. Pursuant to Urgenson's request, Clark arranged to meet with Mattingly in order to review the documents.

Following Clark's review, on October 15, 1990, Urgenson wrote to Mattingly and listed the 25 examination reports that contained information responsive to Gonzalez' request. The Federal Reserve proposed to release redacted copies of eight of the reports to the Committee. Urgenson suggested that revisions be made to the proposed Federal Reserve redactions, and all but one of the revisions involved re-insertions of material that the Federal Reserve had omitted. Urgenson noted that:

> [Y]our files contain other materials responsive to the October 3, 1990 request of the Committee. These include contemporaneous notes or reports prepared by Federal Reserve examiners who are assisting in the criminal investigation. While disclosure of those materials at this time would interfere with the conduct of the criminal investigation, we have agreed that your response to the Committee will clearly refer to the existence of such materials. If possible, we would appreciate receiving a copy of the text of your proposed response to the Committee.

On October 23, 1990, the members of the Gonzalez Committee met to approve a subpoena for documents relating to the BNL matter to be served on, among others, the Federal Reserve Board of Governors and the Federal Reserve Banks of Atlanta, Los Angeles, New York and Chicago.[113] That same day, according to a memorandum prepared by Clark, Mattingly spoke with Clark and

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[113] The two initial sets of subpoenas were issued in November and December of 1990.

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explained that the Federal Reserve had "no experience in dealing with Congressional subpoenas." Mattingly asked Clark "if there was anyone at DOJ knowledgeable in the area with whom he could discuss the procedure and principles involved."

The next day, October 24, representatives from DOJ, Eximbank, Department of Commerce, FBI, United States Customs Service, Department of Treasury, OLC, Federal Reserve and the Department of Agriculture met at the Office of Legislative Affairs regarding the aforesaid subpoenas.[114] At the meeting Tom Reinhardt (OLA) circulated a document he had prepared entitled "Draft Procedures for Processing Documents."

On October 25, 1990, Urgenson wrote to Reinhardt expressing DOJ's "principal concern" with the draft procedures. Urgenson stated that "implementation [of the procedures] would appear to place [DOJ] squarely between the Committee and the various departments and agencies whose information is sought by that Committee." Urgenson stated, in unambiguous terms:

> Our interest in the proceedings before the Committee is limited solely to legitimate concern of whether information concerning the criminal investigation being conducted by the U.S. Attorney's Office in Atlanta -- and potentially harmful to the successful prosecution of charges arising from that investigation -- will be disclosed. To this end, we should seek to review and make recommendations concerning only those materials which the requested parties believe contain information the disclosure of which

[114] On October 23, 1992, the Gonzalez Committee had also met to approve subpoenas for Commerce, Treasury, Customs, Export-Import Bank, and Agriculture.

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> could affect the criminal process, leaving each agency to determine for itself whether to withhold proprietary or deliberative materials.

The next day, October 26, Urgenson wrote to Rukstele and McKenzie in the USAO, requesting that they draft a memorandum to the various interested agencies discussing the types of materials which should be redacted. In response, Rukstele offered the suggestion that the originals be maintained and that "material which might otherwise reveal information concerning conduct of the criminal investigation" not be disclosed, including grand jury material. Lastly, Rukstele recommended that "committee requests for explanations . . . should be avoided."

During the next several weeks, Clark, along with the Atlanta prosecutors, reviewed Federal Reserve documents to determine which documents, or portions thereof, would, if disclosed, adversely affect the BNL prosecution. He also suggested certain redactions. On November 21, 1990, McKenzie wrote to Clark listing reasons for redacting or withholding specific Federal Reserve documents, including: witness safety, witness harassment, intimidation and obstruction, discouraging witness cooperation, revealing trial strategy, revealing attorney work product, violating understandings of confidentiality, encouraging subjects to flee, protecting material under seal pursuant to Court Order, and the ban on disclosure of plea negotiations.

On February 28, 1991, the Indictment was returned. Accordingly, Clark informed Urgenson that the redacted materials which had previously been provided to the Gonzalez Committee would

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have to be reevaluated to determine what could be released now that the Indictment had been returned. Clark stated "that it would be necessary for [McKenzie] to review the material again--on a line by line basis--and make absolutely certain that she was on strong ground for denying this material to the Committee." Clark followed this up with a letter to Brill dated March 13, 1991, in which he encouraged that the materials be reviewed with the objective of releasing as much of the information as possible to the Committee.

On March 27, 1991, Clark confirmed the DOJ's position on redactions in a memorandum to Urgenson which provided as follows:

> As you know, when we asked the Federal Reserve to make redactions in the materials requested by Chairman Gonzalez, it was for the sole purpose of protecting the U.S. Attorney's investigation from premature disclosure of information -- not to protect anyone from embarras[s]ment. Furthermore, following the indictment, we asked the U.S. Attorney's office to review all redacted materials to determine to what extent more of the material may be released to the Congress. We have not -- and should not -- assert interference with the criminal prosecution as the basis for redacting any records prepared by an agency as a result of the normal operation of its programs.

On April 9, 1991, McKenzie confirmed that certain previously redacted portions of the Federal Reserve documents, such as certain references to a previously sealed search warrant, could be disclosed to the Gonzalez Committee. She identified additional Federal Reserve documents, or portions thereof, which could now be released without impeding the ongoing criminal prosecution. On April 17, 1991, McKenzie disclosed additional portions of documents.

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On May 17, 1991, DOJ's W. Lee Rawls (OLA) wrote to Chairman Gonzalez stating that DOJ would now offer to his Committee the opportunity to review on a confidential, no-notes basis, unredacted versions of certain documents that previously had been provided to the Committee in redacted form.

Chairman Greenspan wrote to Chairman Gonzalez on July 26, 1991, regarding subpoenas that had been issued by the Gonzalez Committee on May 17, 1991. Chairman Greenspan explained that many of the requested documents already had been provided to the Gonzalez Committee in redacted form and that nearly all of the redacted information had been withheld at the request of DOJ, because it perceived that premature disclosure of certain information would harm the prosecution. In light of the outstanding subpoenas, however, the Board of Governors transmitted to the Committee the unredacted copies of the documents identified in the subpoenas.

It is clear from a review of this sequence of events that the DOJ's recommendations to the Federal Reserve regarding the redaction or withholding of documents was not motivated by an effort to "thwart the committee's investigation or to withhold information embarrassing to the administration," as Chairman Gonzalez had alleged. DOJ representatives were invited into the process -- the subpoena, after all, was directed to the Federal Reserve -- to protect the integrity of an ongoing, very high profile prosecution. As Urgenson asserted, the DOJ was concerned "only [with] these materials. . .the disclosure of which could

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affect the criminal process. . . ."

Early on, Urgenson clearly indicated that the Federal Reserve would have to notify the Gonzalez Committee that certain documents were being withheld to protect the prosecution efforts. The efforts of the DOJ in this regard are perhaps best illustrated by Clark's statement that the USAO would have to reevaluate all the documents following the Indictment "on a line by line basis [to] make absolutely certain that [there is] strong grounds for denying this material to the Committee."

Clark also expressly stated in an inter-office memorandum that "we asked the Federal Reserve to make redactions . . . for the sole purpose of protecting the U.S. Attorney's investigation from premature disclosure of information, not to protect anyone from embarras[s]ment." The approach of the DOJ is also evidenced by the review process, which was repeated at various stages, and which culminated in Chairman Greenspan's release of all previously redacted documents.

Notwithstanding the foregoing, it should be noted that on October 2, 1990, over one month before any of the document subpoenas were issued, Reinhardt wrote to Maloney and Richard to update them on Chairman Gonzalez' requests for the production of documents and witnesses in a hearing before his Committee.[115] The

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[115] The requests were directed at several agencies, including the Comptroller of the Currency, the Federal Reserve Board, the Federal Deposit Insurance Corporation, and the Agricultural Commodity Credit Corporation.

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memorandum notes that:

> My fears of Gonzalez trying to put this together while keeping us in the dark, seem to be materializing. If you want me to get an Administration position on no information on BNL, then I have to get moving on it. We can do it either by calling together the players and trying to reach agreement amongst ourselves, or kicking it up to OMB and then give instructions to the other agencies involved. Although it is a pain in the neck to do, my choice is to bring in the agencies and reach an agreement with them.

Rawls and Attorney Paul Colborn received copies of the memorandum.

Thereafter, on October 4, 1990, Maloney informed Mueller that "Director Sessions is to attempt to see Gonzalez either this afternoon or tomorrow morning. Failing to persuade Gonzalez will necessitate a call on handling of the subpoena requests." (E-Mail from Maloney to Mueller, dated October 4, 1990.) The person to be called is not identified. In addition, the message further notes that "if subpoenas are issued, this case may provide the vehicle to litigate executive privilege issues in the context of a request for info concerning an ongoing criminal investigation by Congress."

The concerns of the DOJ attornsys and the USAO reflect their need to protect the ongoing criminal prosecution, those concerns are valid. To the extent their comments indicate that they were apprehensive about the political ramifications of the subpoenas, I have found no evidence that they acted on those apprehensions or on any other improper basis in responding to the subpoenas. Moreover, the Federal Reserve, which the DOJ advised, ultimately fully complied with the subpoenas.

Accordingly, there is no basis for further investigation

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into this matter. I find clear and convincing evidence that the above-discussed acts were undertaken by the DOJ to protect the ongoing BNL investigation and prosecution, not to block Representative Gonzalez's investigation. The DOJ and the USAO were obligated by legal constrainta to review the Federal Reserve documents and withhold or redact those which would jeopardize the investigation or expose Grand Jury material. It cannot be true, as some have implicitly suggested, that the DOJ and the USAO were subject to criminal culpability unless they made a full and complete disclosure to the Gonzalez Committee at the risk of violating their obligation under other laws.

2. Interference With Italian Investigation

The Italian Parliamentary Committee issued a preliminary "Final Report" concerning its investigation into the BNL matter in the early part of 1992.[116] That Preliminary Report, at page 20, alleged that the Italian Committee was prevented from interviewing Drogoul and others "especially because of the continuously hostile position on such contacts taken by the United States Attorney in Atlanta in conformity with Justice Department policy."[117] Some have charged that this position was part of a broader "coverup."

A review of the material made available to me does not suggest that either the USAO or the DOJ interfered with the Italian Committee's investigation, let alone that a cover up existed. To

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[116] The exact date of this Preliminary Report is not reflected on the document.

[117] These comments did not appear in the Final Report issued on April 22, 1992. (See Ex. 20.)

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the contrary, attorneys for both the USAO and the DOJ made themselves available to representatives from the Italian Committee on several occasions.

For example, on September 21, 1990, Daniel Lippman (OIA), Rex Young (OIA), Urgenson, McKenzie, and Wade met with representatives from the Italian Committee to discuss the BNL matter. On October 3, 1990, another meeting was held between DOJ attorneys and Italian representatives. A third meeting with representatives from the Italian delegation took place on January 3, 1991. USAO and DOJ representatives attended the January 3 meeting, as well as McKenzie and Wade. Also present was Robert Kennedy, Senior Examiner of the Federal Reserve Bank of Atlanta. Two other meetings with DOJ representatives and Italian Committee representatives took place on March 19, 1991, and July 19, 1991.[118]

It appears that the comments of the Italian Committee in its Report stem from its difficulty in arranging voluntary interviews with witnesses in the United States. Contrary to the Italian Committee's perception, however, neither the USAO nor the DOJ prevented anyone from speaking with the Italian Committee, notwithstanding concerns that the interviews could adversely impact upon the USAO's prosecution. The relevant documents accurately

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[118] Other meetings were held with the Italian prosecutors. For example, in mid-March of 1990, the USAO's McKenzie and Alexander and members of the USAO's investigative team met with Montaldi, the Assistant Prosecutor of the Italian Republic. On April 8, 1991, Brill and McKenzie wrote to Montaldi explaining the Fed. R. Crim. P. 6(e) prohibition on the release of either Grand Jury documents or testimony.

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reflect the positions of the DOJ and the USAO.

On May 29, 1991, DOJ's Drew Arena (OIA) sent a memorandum to Clark of the Fraud Section concerning proposed voluntary interviews of witnesses by Zanelli, Counsel to the Italian Committee. Through the Italian Consulate in New York, Zanelli had invited a number of witnesses to speak informally with him and other representatives from the Committee. Attached to Arena's memorandum was a three-page list of interviews scheduled for the weeks of June 3, and June 10, 1991. In another memorandum written on May 29, Arena notified Richard, also of DOJ's Fraud Section, of the proposed voluntary interviews scheduled by Zanelli, stating that Zanelli was uncertain which witnesses have agreed to be interviewed.

The next day, May 30, 1991, McKenzie wrote to Laura J. Barsella (OIA) stating that Zanelli's proposed interviews could adversely impact the USAO's prosecution of the BNL matter. In a telephone conversation with Barsella that same day, McKenzie stated that she objected to Zanelli's proposed interviews because she was concerned about an "Ollie North problem," whereby BNL targets could later claim that the Italian Committee had given them immunity from prosecution. McKenzie also stated that she had no objection to Zanelli interviewing present BNL employees since they are, in effect, employees of the Italian Government. (Memorandum from Barsella to File, dated May 30, 1991.)

When McKenzie and Clark spoke about the interviews, it was agreed that Zanelli should be provided with a letter to be

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given to the proposed witnesses that would make it clear that the Italian Committee could not confer immunity. (Id.) This procedure was confirmed in a May 30, 1991, memorandum from Urgenson to Arena. In his memorandum, Urgenson suggested that Zanelli be furnished with a letter to be given to each of the witnesses stating that DOJ had received notice of the requested interviews, that it understands the interviews to be voluntary, that no immunity is to be conferred upon the witness under Italian law, that no immunity from United States prosecution should be implied, and that, if compelled by Court order, the United States prosecutors would produce memoranda of the interviews.

On May 31, 1991, DOJ's Maloney wrote to Zanelli expressing DOJ's concerns that the interviews would adversely impact the USAO's prosecution. Maloney requested that Zanelli delay the interviews until the USAO's prosecution was completed. Maloney, however, went on to state that if Zanelli did proceed with the interviews, Zanelli should clearly inform each witness that the Italian investigation is unrelated to the USAO prosecution and that their cooperation with the Italian investigation should not be considered as any type of immunity from prosecution. Maloney also asked for copies of any promises made to witnesses by the Italian Committee.

On May 31, the day Maloney's letter was sent to Zanelli, Zanelli called Barsella and stated that by conducting voluntary interviews he was only doing what he could to conduct his investigation. He also stated that while he was willing to hear

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McKenzie's concerns, he must talk to witnesses who were willing to talk to him. Zanelli added that if certain witnesses did not want to speak with him, he would have to "take the next step, which may involve asking for help under treaties and statutes."

On June 2, 1991, Barsella and Zanelli spoke by telephone once again. The purpose of the call, according to a memorandum prepared by Barsella, was to make DOJ's position on the interviews "known" to Zanelli. Barsella explained that, under the United States system, interviews of witnesses are usually limited because "when witnesses are interviewed it is often the case that the defendant and his attorney [will have] access to the reports of the interviews. The more times someone is interviewed, the more reports are generated, and the more material the defense may have to work with." Barsalla noted that it was for this reason that DOJ had requested the U.S. Congressional committees to postpone their interviews. Barsella also raised the immunity concerns for Zanelli, specifically referencing the North decision as "another reason we have asked Congress to postpone its interviews of . . . witnesses of potential defendants."

Having said all this, Barsella asked Zanelli to postpone his interviews. Barsella made it clear, however, that if Zanelli "felt he must proceed with voluntary interviews of witnesses there was very little we could do . . . [although] we are not in a position to assist him in his interviews." Barsella then went on to make the same three requests made by Maloney in his letter of May 31 in the event Zanelli elected to go forward with the

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interviews: (1) make it clear to each witness that the Italian investigation is not related to the U.S. prosecution; (2) make it clear to each witness that cooperation with the Italian investigation cannot be construed as giving the witness any type of immunity from prosecution; and (3) provide DOJ with copies of any promise made by the Italians to any witness.

Zanelli told Barsella that "he had no problem at all in abiding by" the first two requests. Zanelli raised concerns, however, with protecting plea bargains entered into under the Italian law.

On June 3, 1991, Barsella and Zanelli spoke once again by telephone. In her memorandum of that conversation, Barsella notes that Zanelli indicated that while "most of the Italian witnesses [BNL employees and other people in the Italian Banking community] said that they would probably come to be interviewed . . . most American witnesses have indicated that they probably won't come."

During a subsequent conversation between Barsella and Ettore Laurenzano (a colleague of Zanelli's), it was confirmed that the Italian Committee had informed all witnesses, who had thus far been interviewed, that the Italian Committee investigation was not in any way related to the U.S. prosecution and that their cooperation with the Italian Committee cannot be construed as immunity for the witnesses. This was all confirmed in a June 5, 1991, letter from Zanelli to Maloney.

On June 7, 1991, Clark sent a memo to Urgenson noting that "interviews are being conducted in New York by Professor

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Zanelli" and that Barsella "has not heard of any further difficulties or problems with the interviews."

According to a memorandum prepared by Barsella, Zanelli and Barsella, during the July 19, 1991, meeting at DOJ, again discussed the interview situation. Zanelli stated that some members of the Italian Parliament would blame the United States Government for the failure of some witnesses to voluntarily come forth for interviews. Zanelli also reiterated what he had told Barsella on May 31 that he may resort to a forsal treaty request to gain access to the witneeses. After some disoussion with Barsalla, Zanelli said that he understood that his preliminary investigation may not qualify for assistance under the treaty, but that he felt obliged to make the request in any event.

On July 25, 1991, apparently having been prompted by a letter from Zanelli suggesting otherwise, McKenzie informed Arena that she had "told all witnesses and/or their lawyers that they were free to talk with whomever they want and they are free not to talk, if they don't want to."

On August 2, 1992, Maloney wrote to Zanelli stating, in part, that Barsella had informed him (Maloney) of Zanelli's "disappointment that certain potential witnesses in the BNL matter did not accept [Zanelli's] invitation" to be interviewed. Maloney "assured" Zanelli "that any decisions by these witnesses not to be interviewed were their own." Maloney want on to state that the "Justioe Department cannot instruct any witness to speak, or not to speak with a third party. That is a deoision that witnesses must

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make on their own, with the advice of their attorneys." Maloney invited Zanelli to contact McKenzie to get a listing of attorneys representing witnesses "to discuss [with them] the possibility of questioning" their clients. Maloney also noted that he understood that Zanelli contemplated filing a treaty request to seek assistance in compelling the appearance of witnesses at interviews. Maloney stated that "[i]n all likelihood, a request from your investigative commission could not be entertained under the treaty." Maloney also reminded Zanelli that DOJ "remains willing to assist your investigation to the extent such assistance is authorized by United States law."

On August 23, 1991, Zanelli wrote to Maloney acknowledging his August 2 letter and stating that he (Zanelli) had a list of attorneys and their clients whom the Italian Committee might be interested in contacting. Zanelli informed Maloney that he would "check the list" with McKenzie. Zanelli also confirmed "the understanding that any potential witness would be clearly advised of the nature of our investigation as unrelated to the activities of [DOJ] and not conducive to any sort of consideration of immunity."

During the next few months, McKenzie and Zanelli corresponded and McKenzie supplied Zanelli information concerning certain documents. In a letter dated December 18, 1991, McKenzie offered to discuss any concern Zanelli may have with respect to access to documents.

In response to a treaty request, certain materials were

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sent to the Italian Committee on February 13, 1992, under cover of letter from Barsella. Grand Jury material was not sent, and Barsella stated that to the extent Grand Jury material is disclosed during the trial "it will then become accessible." Subsequently, Clark and Maloney exchanged E-Mail, commenting that the preliminary Italian Senate Report was "off base" in its allegations that United States prosecutors interfered with the Italian investigation.

Finally, on March 4, 1992, Arena wrote to Egrego Dott Palmieri returning the treaty request, noting that "the Mutual Legal Assistance Treaty in Force between our two countries was never intended to be used on behalf of, and we will not grant assistance under the treaty for use by, legislative bodies." Arena further stated:

> Although the Department of Justice has no obligation under the treaty to render assistance to the parliamentary commission, members of the Department have met with the special counsel for the commission, Professor Enrico Zanelli, on a number of occasions over the last year, including a meeting in October attended by Deputy Assistant Attorney General Paul Maloney, Professor Zanelli, and several senators who are members of the Parliamentary Commission. All members of the Department have continuously expressed to the commission their willingness to assist the commission's work in whatever way they can without jeopardizing the criminal case that is currently pending in Atlanta. Indeed, over the last year, Prof. Zanelli has regularly asked the prosecutor in Atlanta for assistance regarding documents and transactions that have been examined in the course of the Atlanta investigation. On every occasion, the prosecutor attempted to provide Prof. Zanelli with the requested information within the constraints of our laws, such as the law that imposes secrecy upon information by a grand jury.

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Based upon this background, there is no reasonable basis to conclude that either DOJ or the USAO interfered with the Italians' access to witnesses or documents. While concern was expressed with the interviews Zanelli was proposing, DOJ representatives repeatedly made it clear that they could not stop Zanelli from proceeding. The DOJ requested certain procedures to protect the USAO's prosecution, which Zanelli, for the most part, agreed to. In addition, the names of the attorneys representing defendants and witnesses were offered to Zanelli so that he could contact them to try to arrange interviews. Lastly, even though the Italian treaty request was ultimately rejected as without basis, documents were still provided to the Italian Committee.

I conclude that there are no reasonable grounds to conduct a further investigation in this matter. The USAO cooperated with the Italians beyond what was required of them. There is no suggestion of criminal activity in this behavior.

3. The Alleged DOJ Shredding Incident

On November 6, 1992, I received a letter, via facsimile, from Bobby Lee Cook, former counsel for Drogoul, informing me of a possible incident of BNL document shredding at the "Security Division" of DOJ. Cook had received a telephone call from Robert Fricker ("Fricker") of the ABA Journal. Apparently Fricker heard from a fellow journalist, who allegedly had been contacted by a DOJ employee, that individuals in the "Security Division" were shredding BNL documents.

In response to this information I immediately asked the

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FBI to interview Fricker. That same day, November 6, an FBI agent located Fricker in the passenger lobby of the San Antonio International Airport during a layover on his flight from Chicago to Monterrey, Mexico. At that time, Fricker agreed to be interviewed there. Although he refused to identify his source, Fricker explained that on a scale of one to ten, the veracity of his source of information was a "five." Fricker has still been unable to further verify this inforsation, as of the most recent FBI contact with him. Additional FBI investigation into the matter has indicated that there was no truth to this report.

In light of the foregoing I ses no need to further investigate this issue. I have returned the FBI's memorandum of interviews and other documentation.

B. Allegations of Improprieties Outside the Justice Department

1. Alleged Department Of Commerce Improprieties

On October 30, 1992, I received a letter from Senator Donald W. Riegle, Jr., Chairman, United States Senate Committee on Banking, Housing, and Urban Affairs, requesting that I recommend the appointment of a "statutory Independent Counsel to investigate and prosecute possible violations of law," by the Department of Commerce and its Under Secretary for Export Administration, Dennis Kloske. (Letter from Sen. Riegle to Frederick B. Lacey, dated October 30, 1992.) These allegations concern the alleged alteration of copies of export license documents provided to the Commerce, Consumer and Monetary Affairs Subcommittee of the House

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Committee on Government Operations (the "Barnard Subcommittee") in response to an October 1990 request by Representative Doug Barnard, Jr., Chairman, for information on the licensing of exports of dual use goods to Iraq.

In responding to Representative Barnard, persons in the Commerce Department under the direction of Kloske obtained a computer printout from the Commerce Department's database system. The printout contained entries for export licenses which described the products involved as "military vehicles" or "vehicles designed for military use." Before the printout was sent to the Barnard Subcommittee, Kloske ordered the description of the trucks to be altered, deleting the word "military" from the description and changing the entries to read "commercial utility cargo trucks," "commercial utility cargo vehicles" or "vehicles."

As a result of the Barnard Subcommittee investigation into these alterations, and the surrounding publicity, the Commerce Department's General Counsel requested that the Commerce Department's Inspector General review the matter. On June 4, 1991, the Inspector General issued his report, stating that information on 68 export licenses had been altered. The report noted that, in several instances, the alterations were "unjustified and misleading." (Commerce Inspector General's Report, dated June 4, 1991.)

On June 25, 1992, Kloske submitted a written statement to the House Judiciary Committee in which he stated that he changed the description of the trucks "to provide Congress with a more

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accurate description of the vehicles and to make clear that the Department of Commerce was not exceeding its jurisdiction by licensing the export of combat vehicles." (See Report of the Attorney General to the House Committee on the Judiciary, dated August 10, 1992, at 28.) Numerous witnesses, however, have questioned Kloske's alteration of the truck descriptions. (Id.)

The FBI has delivered to me the various reports of witness interviews and I have examined the file in this matter. While there are some inconsistencies in the witnesses' statements, they generally support Kloske's version of events and his stated reasons for changing the descriptions.

However, additional material from Senator Riegle has come to my attention which, in my opinion, warrants further investigation into this matter. In his November 25, 1992, letter to me, Senator Riegle states:

> 16 months have now passed since the Justice Department began to review a formal request by House Subcommittee Chairman Barnard to pursue apparent criminal activity regarding the Commerce Department's export licensing practices regarding Iraq.
>
> As mentioned in my previous letter, certain export licenses of sensitive materials to Iraq were later altered by the Commerce Department and then formally submitted to Congress in a falsified form.
>
> The Inspector General at the Commerce Department has already determined that certain of those document alterations were unjustified. With these facts now known it seems to me that at least three specific criminal statutes appear to have been violated.

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After discussing the background of Kloske's changes to the truck description, Senator Riegle next refers to another document formally submitted to Congress by the Commerce Department "in a falsified form."

> I have enclosed one such document alteration so it is clear what took place. In this instance, Commerce Department officials deleted the words: "According to our information the end-user is involved in military matters." This deliberate and willful deletion concealed from the Congress the fact this shipment was made to a military end-user in Iraq.

(Id.)

The document referred to in the foregoing quotation deals with a shipment of equipment from the Hewlett-Packard Company to the Salam Al Din Establishment. The original version of the document provides:

> ECCM-1531-FREQ.SYNTHESIZERS & EQUIP. CONTAINING (SPECIF.) ENDUSE: ACCORDING TO OUR INFORMATION THE END-USER IS INVOLVED IN MILITARY MATTERS. ENDUSE INFORMATION: THE ORDERED PRODUCTS WILL BE USED IN CALIBRATING, ADJUSTING AND TESTING ON A SURVEILLANCE RADAR SUPPLIED BY THOMSON.

In the version submitted to Congress, the Commerce Department deleted the words "according to our information the end-use is involved in military matters," so that the document appeared as follows:

> ECCM-1531-FREQ.SYNTHESIZERS & EQUIP. CONTAINING (SPECIF.) ENDUSE: THE ORDERED PRODUCTS WILL BE USED IN CALIBRATING, ADJUSTING AND TESTING ON A SURVEILLANCE RADAR SUPPLIED BY THOMSON.

Senator Riegle also enclosed a copy of a memorandum from Iain S. Baird to John Young (cc: Robert Kugelman and Jack Floyd),

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dated March 22, 1991. The memorandum notes:

> During the recent "crash" project in producing a "sanitized" copy of the Iraqi license printouts, a member of your staff was instrumental in assisting OEL in completing this task: . . .. [He] worked long after the end of his work day to assist my staff in producing the necessary information. . .. [His] efforts made it possible for us to meet the time frame requested by Under Secretary Kloske . . ..

Upon receipt of Senator Riegle's November 25 letter, I immediately requested interviews or reinterviews of Baird, Young, Kugelman and Floyd. Although Kloske is no longer with the Department of Commerce, I asked the FBI to reinterview him regarding the alteration to the Hewlett-Packard export license. On December 3 and 4, 1992, the FBI reinterviewed Baird and Young and interviewed Floyd and Kingham Khamvongsa, a Department of Commerce computer specialist. The FBI has attempted, on numerous occasions, to contact Kloske but has been unable to do so. A final unsuccessful attempt was made on December 7, 1992.

I have reviewed the FBI's records of these interviews and note that Baird and Floyd explain that the Department of Commerce's Export Regulations, covering proprietary business information, prohibit the release of exporter and consignee identifications. Whether the removal of the phrase "according to our information the end-user is involved in military matters" is an appropriate deletion is an issue which must be resolved.

Since it is now clear that Kloske's alteration was not the only alteration in the printout before it went to tha Barnard Subcommittee, and in light of the Baird memorandum, I cannot say,

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on this information, that I have clear and convincing evidence that no improper motive existed. I believe that further investigation into this matter is necessary.

2. Alleged Shredding Of BNL-Related Documents At USDA

Following my appointment as Independent Counsel, I learned of allegations that documents relating to the involvement of the USDA in the CCC guaranteed loan program to Iraq were being shredded by USDA employees. I immediately called the FBI and learned that Director Sessions already had agents investigating tha matter. I have reviewed the reports of the FBI's investigation, and it appears that the documents which were shredded were unrelated to the BNL investigation; indeed, there does not appear to be any violation of federal law.

This matter is accurately summarized in a November 28, 1992 memorandum prepared by the FBI Special Agent who conducted the investigation. I will draw from that memorandum in the following section.

On October 27, 1992, tha Inspector General's Office and Secretary of Agriculture of tha USDA was notified of three separate inquiries from Congressional committees into the alleged destruction of documents by Dr. Sarita Schotta, Deputy Administrator, Agricultural Stabilization and Conservation Service (the "Conservation Service"), and her staff.

From October 27 to 29, 1992, Special Agents of the Inspector General conducted interviews of USDA employees to determine the validity of these allegations. These interviews

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showed that no USDA employee had shredded, removed or destroyed documents relating to USDA's involvement in the BNL matter. The only documents shredded were Dr. Schotta's draft responses to a September 1992 Audit Report prepared by the Inspector General on the Conservation Service. Drafts of Dr. Schotta's response to the Audit Report were circulated for review to personnel within the Conservation Service and other departments within the USDA. When a subsequent draft was distributed, the earlier draft was retrieved and shredded as a means of document control. Dr. Schotta explained that the shredding of the earlier drafts followed normal procedures for her office. Since June 1992, a shredder had been maintained within Dr. Schotta's office space.

A portion of the Inspector General's Audit Report was critical of certain procurement practices of the Conservation Service, specifically the hiring of a firm to process complex claims from American banks that had made guaranteed loans to Iraq through the CCC program. The audit report indicated that the Conservation Service should have allowed competitive bidding on the contract to process the claims rather than hiring the firm on a monthly purchase order basis.

Dr. Schotta's response to the Audit Report included a portion defending the hiring of the firm on a purchase order basis as a means of preventing interest penalties on the banks' claims. Dr. Schotta's response indicated that placing the contract to handle the claims under competitive bidding would have caused a delay, resulting in the imposition of penalties and interest that

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could have amounted to millions of dollars. The only portion of Dr. Schotta's response that had anything to do with the BNL matter was the hiring of this firm. Other portions of the report concerned unrelated issues such as travel, training, personnel, and other procurement matters.

The USDA Inspector General investigated not only the allegations concerning the shredding of material by Dr. Schotta and her staff, but also allegations that shredding had gone on in other units or offices of the USDA. The Inspector General found that the allegations were unfounded and determined, following a physical review of all of the Iraqi documents, that all these documents were accounted for.

The Inspector General's review of Dr. Schotta's earlier draft responses to the Audit Report (the earlier drafts had been retained by the Inspector General), also revealed that the changes that Dr. Schotta made were grammatical, and/or stylistic in nature, and not factual or substantive.

In addition, it was learned that John A. Stevenson, Associate Administrator at the Conservation Service, upon hearing of the shredding allegations, confiscated not only the shredder from Dr. Schotta's office, but shredders from other units and offices in the USDA. In addition, Stevenson confiscated six small garbage bags containing the materials shredded by Dr. Schotta and her staff.

The FBI also interviewed Dr. Schotta's husband, Charles Schotta, Deputy Assistant Secretary, Department of the Treasury,

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who stated that he had no knowledge of the incident. I have returned to the FBI its memorandum in this matter.

C. Miscellaneous Allegations

1. The Alleged Connection Between BNL And Bank Of Credit And Commerce International ("BCCI")

During the course of the FBI/DOJ Task Force investigation concerning BCCI, periodic media allegations appeared linking BCCI with BNL. I have determined that there was a BNL-BCCI correspondent banking relationship. This relationship appeared to have been consistent with the correspondent relationshipe both banks maintained with numerous other banks. I have also determined that the investigation to date has developed no evidence identifying criminal activities based on the ralationship between the two banks.

2. Kissinger Associates

Representative Gonzalez and some of the media have suggested that Henry Kissinger ("Kissinger"), his consulting firm, Kissinger Asscciates, Inc. ("Kissinger Associates"), and two former Kissinger Associates directors, Lawrence S. Eagleburger ("Eagleburger") and Brent Scowcroft ("Scowcroft") combined their public poste and private positions to "coverup" the BNL scandal.

Kissinger served as President Nixon's National Security Advisor and subsequently as his Secretary of State. In 1989, Kissinger was appointed as a member of the President's Foreign Intelligence Advisory Board. Kissinger Associates was founded in 1982 and analyzes international political, economic and social trends to help clients make business decisions about operations in

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foreign countries. Before joining President Bush's administration as National Security Advisor and head of the NSC in January 1989, Scowcroft served as Vice President of Kissinger Associates and headed its Washington, D.C. office. Prior to assuming his position as Deputy Secretary of State in 1989, Eagleburger, like Scowcroft, worked for Kissinger Associates, and served as its President. During their employment with Kissinger Associatas, BNL was a client of that consulting firm.

It is clear that, while at Kissinger Associates, Scowcroft end Eagleburger came into contact with BNL management. I have seen nothing, however, to suggest that they knew of BNL-Atlanta's wrongful loans to Iraq or influenced the prosecution of this matter.

3. The Appointment And Recusal Of Joseph D. Whitley

The fact that Joseph D. Whitley was appointed United States Attorney for the Northern District of Georgia has been criticized because his former law firm had, at one time, represented Matrix-Churchill. In fact, Mr. Whitley became Acting United States Attorney on June 1, 1990, and verbally recused himself from the BNL case the same day. A week later his recusal was confirmed by a written memorandum. Thereafter, Mr. Whitley was confirmed by the United States Senate and appointed by the President on August 4 and August 7, 1990, respectively. He took the oath of office on September 1, 1990. Thus, all the facts that critics point to were available at the time the United States Senate confirmed him. Presumably, the background investigation and

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Senate confirmation process would have aired any malfeasance had Mr. Whitley engaged in any impropriety or participated in a "cover up." I see no reason to pursue these allegations further.

IX. THE UNCLASSIFIED BNL CABLE STORY

In Part II of my Report, I deal with the allegations that intelligence information was withheld from, or misrepresented to, Judge Shoob or the USAO in the BNL matter. My analysis requires a detailed discussion of many classified materials. Thus, I have designated Part II as "Top Secret - Codeword" for present purposes to avoid any inadvertent unlawful disclosure.[119] What follows is an unclassified summary of Part II.

A. DOJ Requests for Intelligence Information - 1990

The USAO first asked for assistance in collecting certain information in December 1989, when McKenzie wrote to Molly Worlow of the DOJ's Office of International Affairs. Initially, there was confusion about whether the attorneys at DOJ or those at the USAO were to be responsible for making these requests. By July 1990, however, the DOJ had agreed to assume responsibility for requesting and gathering intelligence information sought by the USAO, or at least so the latter understood.

In August, and again in October 1992, Theodore Greenberg at DOJ sent requests to all the U.S. intelligence agencies. Based on his prior experience, Greenberg deliberately framed very broad

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[119] I have requested of Attorney General Barr that the usual arrangements be made for review by intelligence review persons of Part II of my Report in order to classify each page more specifically.

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requests to ensure that DOJ obtained, among other things, any intelligence information on the subjects of whether BNL-Rome had contemporaneous knowledge of BNL-Atlanta's unauthorized loans to Iraq, and whether the U.S. intelligence agencies themselves had contemporaneous knowledge of, or involvement in, those unauthorized loans. He stated that the DOJ was primarily interested in receiving this information to ascertain whether Drogoul might have a "greymail" defense -- that the United States government had endorsed his misconduct -- since Greenberg believed the subject of whether "BNL-Rome knew" was being addressed in depth on other fronts, as discussed previously in this Report.

From October through December 1990, the intelligence agencies produced substantial amounts of materials in response to these requests, including 10 cables or "reports"[129] that contained information suggesting that "BNL-Rome knew." I have seen some evidence that Greenberg and Peter Clark at DOJ reviewed some, if not all, of the intelligence materials when they were first produced, including a few of the reports on the subject of whether "BNL-Rome knew." However, there is no written record of who, in fact, reviewed these materials, precisely what was found, what was done to analyze and follow up on the information, or what conclusions were ultimately drawn. The two persons who appear to have been involved (Clark and Greenberg) have only hazy recollections on these subjects.

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[129] The Intelligence Community commonly refers to its cables, which are typically one or two-page messages, as "reports."

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Clark stated that he believed the intelligence information was not particularly probative and that it created no leads that had not already been explored. Clark also stated that he conveyed his views to the USAO, and that he suggested that the USAO should review this information. The USAO learned, based on their communications with Clark, that there was no intelligence information of value to the case. Classified documents were reviewed by USDA's Arthur Wade in December 1990 or January 1991, and again by Wade and U.S. Customs Agent Richard Horton on September 13, 1991. McKenzie and Chartash reviewed all the cables with Wade in Washington on April 30, 1992.

What is clear is that the decision to treat BNL-Rome as a "victim" of BNL-Atlanta's "off-book" loans in the Indictment returned in February 1991 was the result of direct evidence gathered by the DOJ, USAO, and its Task Force during the investigation and Grand Jury process. In my opinion, the decision was not influenced by the reports gathered from the intelligence agencies, except to the extent that the DOJ and the USAO viewed the absence of contradictory information in the reports as tending to confirm the USAO's theory that BNL-Rome "had not known."

B. Dissemination Of The Intelligence Information By The DOJ And The FBI -- 1989 Through 1991

It is important to note that the DOJ and the FBI were receiving some of this intelligence information through normal dissemination channels as early as 1989. The DOJ received one report in April 1990 discussing whether "BNL-Rome knew," and FBI headquarters received four intelligence reports on this subject

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(two in October 1989, and one each in January 1990, and April 1990). Three of these reports were routed to the Task Force in Atlanta. Although in my view the system for disseminating these reports is inadequate, particularly at DOJ, I have seen no indication that dissemination channels were deliberately blocked to prevent the DOJ or the USAO from reviewing any intelligence information.

C. Events In September 1992

On September 1, 1992, Ellen Meltzer at DOJ drafted letters to certain U.S. intelligence agencies asking again for information about whether "BNL-Rome knew," and whether the agencies had any contemporaneous involvement in or knowledge of BNL-Atlanta's activities. In particular, Question 8 in these letters asked whether the Intelligence Community had "any information" that BNL-Rome was "aware" of BNL-Atlanta's "illegal activities." Mueller at DOJ stated that he wanted to follow up "every lead" on this issue before Drogoul's sentencing hearing which had been set to begin on September 14.

The intelligence agencies responded by letter several days later. The CIA's declassified response to Question 8 stated only that the agency had "publicly available information" that BNL-Rome knew, but contained no reference to any private source information. Meltzer questioned this response in a conversation with Urgenson on September 4, and then asked Brinkac at DOJ to follow this up with the CIA. It is unclear whether this was ever done. There is no record indicating that anyone checked this

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response against the information already in the DOJ's files.

Nonetheless, Meltzer and the USAO relied on the CIA's negative statement in preparing the Sentencing Memorandum for the Court on September 11. That Memorandum stated that "no credible evidence" existed to support the suggestion that BNL-Rome and U.S. intelligence agencies knew of Drogoul's unauthorized loan activity.

The accuracy of the CIA's response to Question 8 was called into question on September 14, the day the Drogoul sentencing hearing began. Representative Gonzalez issued a press release stating that he had a classified CIA Summary that expressly stated that BNL-Rome was "witting" (or aware) of BNL-Atlanta's "activities."[121] Representative Gonzalez interpreted this information in the CIA Summary to be "in direct conflict with the Justice Department's prosecutorial theory which fingers BNL-Atlanta as a rogue operation, operating independently of BNL's Rome headquarters." At the same time that the press release was issued, Drogoul's lawyer was arguing in the sentencing hearing that U.S. intelligence agencies had known all along of BNL-Atlanta's activities, and supported them.

The USAO attorneys (and DOJ as well) were surprised by Representative Gonzalez' press release, because they had never seen the Summary provided by the CIA to Congress in October 1991, and did not think there was any other intelligence information that

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[121] Representative Gonzalez had learned of this information back in October 1991, when his staff had reviewed and taken notes on a summary of intelligence information that the CIA prepared in response to a subpoena by the Gonzalez Committee.

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would support Representative Gonzalez' claims. Almost immediately, they received a copy of the Summary and the intelligence rsports it was based on, and proceeded to study these documents. After their review, they noted that the Summary did not say expressly that BNL-Rome officers knew contemporaneously of "illegal" activities at BNL-Atlanta, but instead was ambiguous as to what "activities" BNL-Rome was purportedly aware of. They further determined that even if the Summary could be read to say that "BNL-Rome knew," the reports underlying the Summary contained no firm information that supported that inference; rather, the reports were based on press reports, speculation, or information already investigated and found to ba either inaccurate or inapposite.

After conducting thair review, the DOJ attorneys decided that some explanation in response to Representative Gonzalez' press release was necessary. They undertook to provide one by seeking to declassify the letter containing the CIA's response to Question 8. They also asked that tha CIA provido a statement for a press release to explain what they viewed as an inconsistency between Representative Gonzalez' interpretation of the Summary and the actual intelligence information in tha reports underlying that Summary.

Two of the CIA's lawyers, David Holmes and George Jameson, were not entirely comfortable with the idea of releasing to the public the letter containing the CIA's response to Question 8. In particular, they were concerned that the CIA's reference only to "publicly available" information was incomplete in view of

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Representative Gonzalez' press release, and that some changes should be made to the response. However, according to the CIA, Laurence Urgenson at DOJ "strongly advised" Jameson that no changes be made to the response, and that any changes would have to be accompanied by a full explanation. Holmes and Jameson then agreed to declassify and release their letter without any change in the response to Question 8 in order to be "consistent." The CIA denied being pressured by Urgenson.

The letter was ultimately released on September 17, 1992. Neither the DOJ nor the USAO thought that the letter was inaccurate or misleading at the time. Urgenson and others at the DOJ stated that they expected the CIA also to issue a statement that "corrected" the conclusion in the Summary. It has been reported that the CIA later said that the letter was incomplete and misleading, but Urgenson states that this was not the view of Holmes and Jameson on September 17.

Holmes also supervised the preparation of a statement by the CIA, to be included in a DOJ press release that the DOJ had requested. That statement said in part:

> The [DOJ] believes that neither the summary nor the [underlying] reports permit the definitive conclusion that BNL-Rome was aware that BNL-Atlanta was engaged in illegal activities and further believes that the CIA information does not conflict with the prosecution's theory of the case.

Mueller at the DOJ was not satisfied with this statement. According to Holmes, Mueller called the statement "laughable." Mueller objected to the suggestion in the statement that the CIA

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Summary and the underlying reports permitted any conclusion (let alone a "definitive" conclusion) that BNL-Rome was aware of any illegal activities.

Mueller decided that the statement could not be issued as written, and directed instead that the Summary and the underlying reports be shown in camera to Judge Shoob in Atlanta, so that Judge Shoob could decide for himself whether this information was inconsistent with the prosecution's theory. (Those documents were in fact given to Judge Shoob on September 23.)[122] Mueller did not believe that he was concealing important information by withholding a statement he viewed as inaccurate.

On September 21, DOJ and CIA representatives met to discuss the CIA Summary. At that time, the CIA analyst who prepared the Summary acknowledged that it was ambiguous as to whether BNL-Rome was aware of illegal activities, because the underlying reports were ambiguous.

X. LEGAL ANALYSIS AND CONCLUSIONS

Pursuant to the Independent Counsel statute, upon conclusion of my preliminary investigation,[123] I must determine

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[122] The Summary and the reports were still classified, and could not be released to the public.

[123] In my October 26, 1992, letter to the Attorney General (Ex. 3) in which I recommended a preliminary investigation, I did not distinguish between so-called "covered" persons, defined in 28 U.S.C. § 591(b), and non-covered persons referred to in § 591(c). As to "covered persons," the Independent Counsel statute mandates a preliminary investigation when "information sufficient to constitute grounds to investigate" has been received (§ 591 (a)). As to persons not considered "covered," a preliminary investigation is discretionary under the same (continued...)

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whether there are "reasonable grounds to believe that further investigation" of potential or alleged wrongdoing prohibited by federal criminal law is "warranted." 28 U.S.C. §§ 592(b)(1) and 592(c)(1)(A). In making this determination, I turn to the following criminal provisions which would likely be considered by a Statutory Independent Counsel if appointed: 18 U.S.C. § 1503; 18 U.S.C. § 1505, and 18 U.S.C. § 1001.

As set forth below, each of these criminal statutes requires specific conduct performed with "mens rea" or state of mind. The Independent Counsel statute, however, only permits me to determine that state of mind is lacking if I can find that there is "clear and convincing evidence" of its absence. 28 U.S.C. § 592 (a)(B)(ii). The statute thus creates a virtual rebuttable presumption of the statutory state of mind, a presumption that may be rebutted only by "clear and convincing evidence."

A. 18 U.S.C. §1503

Section 1503 generally proscribes the obstruction of the "due administration of justice," in connection with a judicial proceeding, by corrupt endeavor. The use of the term corruptly, together with the term endeavor, "charges an intentional act." United States v. Haas, 583 F.2d 216 (5th Cir. 1978), cert. denied,

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[123](...continued)
circumstances. In his October 27, 1992 letter to me, in accepting my recommendation, the Attorney General asked: (a) that I commence such preliminary investigation, and (b) that I attempt to conclude it by December 8, 1992, six days before expiration of the Independent Counsel statute. As a review of this Report reveals, my investigation has been wide-ranging and has included within its reach both individuals considered "covered" persons by the statute and those not considered "covered" persons.

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440 U.S. 981 (1979). Generally, the Government must demonstrate that the person charged with a § 1503 offense "knowingly and intentionally undertook an action from which an obstruction of justice was a reasonably foreseeable result." United States v. Thomas, 916 F.2d 647, 651 (11th Cir. 1990) (citations omitted) (emphasis added).

The term "corruptly" connotes specific intent. See United States v. Machi, 811 F.2d 991, 996 (7th Cir. 1987) ("Corruptly means to act with the purpose of obstructing justice."); United States v. Partin, 552 F.2d 621, 641 (5th Cir.), cert. denied, 434 U.S. 903 (1977) ("The word corruptly means a defendant acted with improper motive or with bad or evil or wicked purpose."); United States v. Jeter, 775 F.2d 670 (6th Cir. 1985), cert. denied, 475 U.S. 1142 (1986) (Section 1503's mens rea requirement limits the scope of the statute to persons "who 'corruptly' or intentionally seek to obstruct the due administration of justice.")[126]

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[126] Both the Fourth and Eleventh Circuits have departed somewhat from the specific intent requirement as framed by other Circuits. A recent Eleventh Circuit decision, defining the term "corruptly," constricted the specific intent element as follows:

> 'Corruptly' describes the specific intent of the crime and can vary in meaning with the context of the section 1503 prosecution . . . . Although the government is not required to prove that the defendant had the specific purpose of obstructing justice . . . it must establish that the conduct was prompted at least in part, by a corrupt motive.

United States v. Thomas, 916 F.2d 647, 651 (11th Cir. 1990) (citations omitted); see also United States v. Weinvander, 590 F.2d 1269, 1274 (4th Cir.), cert. denied, 441 U.S. 963 (1979)

(continued...)

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The term "endeavor" has been held to describe "any attempt or effort to obstruct justice." Thomas, 916 F.2d at 651 (citation omitted); United States v. Buffalano, 727 F.2d 50, 53 (2d Cir. 1984) (defining endeavor "as 'any effort or essay to accomplish the evil purpose that the statute was enacted to prevent'") (quoting United States v. Russell, 255 U.S. 138, 143 (1921)). The government need not demonstrate that the endeavor was ultimately successful or that it achieved the desired result. See, e.g., Osborn v. United States, 87 S. Ct. 429, 434-435 (1966); United States v. Jackson, 513 F.2d 450, 460 (D.C. Cir. 1975) ("[I]t is the endeavor to bring about the forbidden result, and not success in achieving the result, that Section 1503 makes a crime."); Thomas, 916 F.2d at 651. However, the court in Brand noted that § 1503 proscribes only those acts which produce or which are capable of producing an effect that prevents the due administration of justice. 775 F.2d at 1465.

B. 18 U.S.C. §1505

Section 1505 of the obstruction of justice statute applies broadly to all pending proceedings, including Congressional proceedings. Section 1505 also requires proof of specific intent, or a corrupt endeavor, to sustain a conviction.

Other than the celebrated cases arising out of the Iran-

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[124](...continued)
(holding that "a defendant who intentionally undertakes an act or attempts to effectuate an arrangement, the reasonably foreseeable consequence of which is to obstruct justice, violates 18 U.S.C. § 503 even if his hope is that the judicial machinery will not be seriously impaired.").

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Contra scandal (see United States v. North, 708 F. Supp. 385 (D.D.C. 1988), and United States v. Poindexter, 951 F.2d 369 (D.C. Cir. 1991)), only a handful of decisions under § 1505 have considered alleged obstructions of Congressional "proceedings." See, e.g. United States v. Mitchell, 877 F.2d 294 (4th Cir. 1989), reh'g denied, 1989 U.S. App. LEXIS 13462 (4th Cir. 1989).

The requirement of § 1505 that the defendant has acted "corruptly" is given similar meaning to the "corrupt" element of § 1503. In United States v. Price, 951 F.2d 1028, 1031 (9th Cir. 1991), the court held that the "requisite intent to violate Section 1505 is . . . merely that the 'defendant must have acted 'corruptly,' i.e., that the act must be done with the purpose of obstructing justice'" (citation omitted). A similar definition was adopted in United States v. Laurins, 857 F.2d 529, 536-37 (9th Cir. 1988), where the court held that the defendant acted corruptly by concealing documents in response to an IRS subpoena.

The District of Columbia Court of Appeals in United States v. Haldeman, 559 F.2d 31 (D.C. Cir. 1976), construing § 1503, adopted a variation of the definitions above, holding that the term "corruptly" means having an evil purpose or intent. See also United States v. Sprecher, 783 F. Supp. 133, 164 (S.D.N.Y. 1992) ("'Corruptly' simply means to be motivated by an improper purpose") (citations omitted).[125] In North, however, the court

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[125] The absence of "illegal means" does not mean that the allegedly violative conduct is not corrupt. Mitchell, 877 F.2d at 298. The court in Mitchell stressed that the crucial inquiry focuses on "whether a defendant had the requisite corrupt intent to improperly influence the investigation, not on the means the defendant employed in bringing to bear this influence." Id. at 299.

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cautioned:

> Unlike courts of law covered by section 1503, congressional committees are part and parcel of a political branch of government and therefore serve wide-ranging political functions not limited to a search for truth in accordance with formal rules . . . No one can seriously question that people constantly attempt in innumerable ways, to obstruct or impede congressional committees . . . but it does not necessarily follow that [it] is . . . [done] corruptly.

The Court of Appeals in United States v. Poindexter, 951 F.2d 369, 379 (D.C. Cir. 1991), in an opinion authored by then Judge Ginsburg, construed more strictly than any other court the scope of sanctionable conduct under § 1505. The Poindexter decision is an apparent retrenchment from the prior decisions of the District of Columbia Court of Appeals (see North, supra, United States v. Lavelle, 751 F.2d 1266 (D.C. Cir.), cert. denied, 474 U.S. 817 (1985)) on the applicability of § 1505 to Executive Branch officials, although the court did not expressly overrule those decisions.

In Poindexter, the defendant was charged with obstructing congressional inquiries into the Iran-Contra scandal. The Poindexter court deemed the term "corruptly" as used in § 1505 to be so vague as to "provide [no] constitutionally adequate notice that it prohibits lying to Congress." Poindexter, 951 F.2d at 379. In an elaborate analysis of the statute, the court suggested that acting "corruptly" oneself would not necessarily be violative of § 1505, and interpreted the statute to proscribe corrupting another by influencing that individual to violate his own legal duty.

With the notable exception of Poindexter, courts interpreting § 1505 have generally construed broadly the range of

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"endeavors" covered by § 1505. In Mitchell, for instance -- a case proscribing an endeavor to stop a congressional investigation -- the court held that any effort or act "when done with the requisite intent to corruptly influence a congressional investigation, violates [§ 1505]." Mitchell, 877 F.2d at 299.

Endeavors proscribed by § 1505 have included directing an individual to destroy records responsive to a DOE subpoena, Sutton, supra; supplying false testimony and directing an individual to alter sales invoices and submit them to an inquiring agency, United States v. Fruchtman, 421 F.2d 1019 (6th Cir), cert. denied, 400 U.S. 849 (1970); deliberately concealing matters material to an SEC investigation, Sprecher, supra; submitting a false document in response to a subpoena issued by the IRS, United States v. Vixie, 532 F.2d 1277 (9th Cir. 1976); supplying evasive answers and concealing knowledge (i.e., feigning forgetfulness) in testimony at SEC investigative hearings, United States v. Alo, 439 F.2d 751 (2d Cir.), cert. denied, 404 U.S. 850, reh'g denied, 404 U.S. 961 (1971); altering, concealing, or withholding records which, according to the Indictment, bore a "reasonable relation" to the subject matter of a Senate Committee inquiry, United States v. Presser, 292 F.2d 171 (6th Cir. 1961), aff'd by an equally divided court, 371 U.S. 71 (1962); and influencing a witness to give false information and testimony to a Senate Committee and its investigators, Stein v. United States, 337 F.2d 14 (9th Cir. 1964), cert. denied, 380 U.S. 907 (1965).

C. 18 U.S.C. §1001

Section 1001 proscribes (1) the knowing and willful falsification or concealment of a material fact; (2) the making of

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any false or fraudulent statement or representation; and (3) the making or using of a false writing or document with knowledge that it contains a false or fraudulent statement "in any matter within the jurisdiction of any department or agency of the United States."

A "concealment" is an "affirmative act by which a material fact is actively concealed." It must be more than a mere passive failure to disclose. U.S. v. Shannon, 836 F.2d 1125, 1130-31 (8th Cir.), cert. denied, 486 U.S. 1058 (1988). A "false statement" is a statement which "is designedly untrue . . . and made with intention to deceive the person to whom the false statement is made or exhibited." U.S. v. Worthington, 822 F.2d 315 (2d Cir.), cert. denied, 484 U.S. 944 (1987). A "false writing" is merely a false statement inserted into a writing. Cf. Devitt, et al., supra, at 450.

The materiality requirement of the statute may be met if the false statement has "the capacity to impair or pervert the function of a government agency." U.S. v. Lichtenstein, 610 F.2d 1272, 1278 (5th Cir.), cert. denied, 447 U.S. 907 (1980):

> The test of 'materiality' is whether the statement 'has the natural tendency to influence, or was capable of influencing, the decision of the tribunal in making a [particular] determination.' Proof of actual reliance on the statement is not required; the Government need only make a reasonable showing of its potential effects.

U.S. v. Diggs, 613 F.2d 988, 999 (D.C. Cir. 1979), cert. denied, 446 U.S. 982 (1980) (quoting Mainstock v. U.S., 231 F.2d 699, 701-702 (D.C. Cir. 1956) (footnote omitted)).

The false statement, concealment or omission must be made "knowingly and willfully." Typically, courts interpret these two

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terms as a unitary concept requiring proof that the defendant made the statement deliberately (and not as the result of a mistake or accident), with knowledge that the statement was false, and with "specific intent." See, e.g., U.S. v. Guzman, 781 F.2d 428, 431 (5th Cir.) cert. denied, 475 U.S. 1143 (1986); U.S. v. Lichtenstein, 610 F.2d at 1277. Several circuits describe specific intent as follows:

> The statement must have been made with an intent to deceive, a design to induce belief in the falsity or to mislead, but § 1001 does not require an intent to defraud -- that is, the intent to deprive someone of something by means of deceit.

United States v. Lichtenstein, 610 F.2d at 1272. See also U.S. v. Corsino, 812 F.2d 26, 29 (1st Cir. 1987); U.S. v. Martin, 772 F.2d 1442 (8th Cir. 1985).

Despite the specific intent requirement, some courts have allowed the "knowingly and willfully" element of the clause to be satisfied by proof that the defendant acted "with reckless disregard of the truthfulness of the statement and with the conscious purpose to avoid learning the truthfulness of the statement." U.S. v. Evans, 559 F.2d 244, 247 (5th Cir. 1977). See also, U.S. v. Hanlon, 548 F.2d 1096, 1100-01 (2d Cir. 1977); United States v. Lange, 528 F.2d 1280, 1288 (5th Cir. 1976).

Given the constraints the Independent Counsel statute imposes on the proof upon which I may rely for "state of mind" findings, in conducting my investigation I examined the words and deeds of individuals and was prepared to infer evil motive as suggested by events unless "clear and convincing evidence" demonstrated otherwise.

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After having carefully studied all of the information I have assembled, as analyzed and discussed in the body of this Report, I conclude that with the exception of the matter of Mr. Kloske, in each instance the evidence is indeed clear and convincing that the requisite intant to obstruct, "cover up" or misrepresent any aspect of the Drogoul prosecution was lacking on the part of those involved or against whom interference has been charged. In fact, I have found that there is no credible evidence to suggest otherwise.

In my scrutiny of all other conduct addressed in this Report (again, with the exception of Mr. Kloske), I have found no credible evidence that any person in the DOJ or the USAO acted to obstruct the due administration of justice in connection with a judicial, Congressional or any other proceeding, or to make any false statements to any department or agency of the United States. Absent any credible evidence of corrupt motive, the "clear and convincing evidence" necesseary to overcome the presumed intent under 28 U.S.C. § 592(a)(B)(ii) is clearly met. Although it was not within the scope of my assignment, my investigation does suggest that a possible exception may exist with respect to the conduct of Mr. Kloske, and the Attorney General may wish to consider further investigation.

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RECOMMENDATION

On the basis of the foregoing I recommend that, pursuant to 28 U.S.C. Sec. 592(b)(1), you promptly notify the Special Division of the United States Court of Appeals for the District of Columbia Circuit that you have determined that there are no reasonable gounds to believe that further investigation is warranted with respect to the matters involved herein. I will not presume to suggest to you a form of notification.

Date: December 8, 1992

Frederick B. Lacey
Independent Counsel
28 U.S.C. Part 600

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THE BANCA NAZIONALE del LAVORO INVESTIGATION

REPORT OF THE INDEPENDENT COUNSEL

FREDERICK B. LACEY ON THE PRELIMINARY INVESTIGATION

PART II

DECEMBER 8, 1992

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B N L

REPORT
of
THE INDEPENDENT COUNSEL

PART II

Dec. 8, 1992

UNCLASSIFIED

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OIC #1		1/26/90	Memorandum	From McKenzie to Richard Re: BNL-Atlanta investigation and plea agreements.
OIC #2	TG #1	2/12/90	Memorandum	From Clark to Greenberg Re: BNL investigation.
OIC #3		4/24/90	Memorandum	From Urgenson to Mueller, Richard, Areas, Martin, Greenberg, Clark Re: BNL prosecution memorandum.
OIC #4		4/90	Prosecution Memorandum	From Rukstele (by McKenzie) to Urgenson Re: Scheme to defraud BNL and to submit false statements.
OIC #5	TG #7	5/9/90	Facsimile Transmittal and Memorandum	Fax from Clark to Urgenson. Memorandum from Clark to Urgenson and Greenberg Re: BNL.
OIC #6		5/29/90	List	Attendance at May 29, 1990 White House meeting.
OIC #7	TG #4	7/3/90	Letter	From Rukstele to Richard Re: Current status of BNL investigation.
OIC #8	TG #3	7/12/90	Memorandum	From Greenberg to Urgenson Re: BNL investigation.
OIC #9	TG #2	7/12/90	Memorandum	From Clark to Greenberg Re: CIA knowledge.
OIC #10	TG #8	8/3/90	Memorandum	From Greenberg to [redacted] Re: Request for traces and other CIA information.
OIC #11		8/13/90	Draft Memorandum	From Dennis to Attorney General Barr Re: Status of BNL investigation.
OIC #12	TG #10	8/24/90	E-Mail	From Greenberg Re: Various topics relating to BNL investigation.

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OIC #13		3/11/91	Letter	From [redacted] to Clark Re: Intelligence report on BNL.
OIC #14		11/6/89	Typescript	Summary prepared by [redacted] Re: Iraq-Italy Repercussions of the BNL-Atlanta Scandal ("November 6 Typescript").
OIC #15	TG #9	8/24/90	Letter	From Jameson to Greenberg Re: CIA traces.
OIC #16	RM #2	10/1/90	Status Report	From Rukstele (by McKenzie) to Mueller Re: Status of BNL investigation.
OIC #17	TG #11	10/2/90	Letter	From Jameson to Greenberg Re: CIA traces.
OIC #18	TG #12	Undated	Memorandum	Results of CIA traces.
OIC #19	TG #13	10/2/90	E-Mail	From Clark Re: Meeting between USAO and DOJ.
OIC #20	TG #14	10/8/90	Letter	From Greenberg to Jameson Re: CIA traces.
OIC #21	TG #16	10/15/90	Letter	From McKenzie to Urgenson Re: Proposed indictment.
OIC #22	TG #17	10/25/90	Prosecution Memorandum	From Whitley (by McKenzie) to Urgenson Re: Proposed indictment.
OIC #23	TG #18	11/13/90	Memorandum	From Clark (through Greenberg) to Urgenson Re: New York FRB documents.
OIC #24	PC #5	11/15/90	Letter	From Urgenson to Rukstele Re: Subpoenaed documents and questions relating thereto.
OIC #25	PC #6	11/19/90	Memorandum	From Urgenson to Maloney Re: Update of BNL investigation.

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OIC #26	RM #3	11/30/90	Memorandum	From Urgenson (through Maloney) to Mueller Re: BNL status report.
OIC #27	TG #21	12/7/90	Memorandum w/ 4 E-Mail attachments	From Clark to Urgenson Re: Review of Intelligence information; E-Mails from Greenberg Re: same.
OIC #28	PC #7	12/10/90	Letter	From McKenzie to Urgenson Re: DOJ assistance.
OIC #29	TG #20	12/6/90	Memorandum	From Clark to McKenzie Re: Indictment and BNL investigation.
OIC #30	PC #8	1/11/91	Memorandum	From Taylor to Files Re: 1/11/90 meeting between USAO and DOJ.
OIC #31	PC #9	1/31/91	Memorandum and Prosecution Memorandum	From Clark to Urgenson Re: Summary of investigation; Prosecution Memorandum from Urgenson (through Maloney) to Mueller Re: Fraud Section analysis of USAO proposed indictment.
OIC #32	PC #11	2/1/91	Memorandum and Prosecution Memorandum	From Urgenson (through Maloney) to Mueller Re: BNL Status Report.
OIC #33		2/1/91	Memorandum	From Clark to Urgenson Re: Gonzalez subpoena and other items.
OIC #34		2/7/91	Memorandum	From Urgenson to Mueller Re: Proposed foreign defendants.
OIC #35		3/5/91	Letter	From [redacted] to Clark Re: CIA traces.
OIC #36		2/24/92	Letter	From Gonzalez to Barr Re: Intelligence requests.

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OIC #37		T: 6/5/92 S: 6/26/92	Letter	From Richard to Jameson Re: Diverted CCC guaranteed agricultural products.
OIC #38		5/5/92	Letter	From Richard to Thessin Re: Diverted CCC guaranteed agricultural products.
OIC #39		5/5/92	Letter	From Richard to Brady Re: Diverted CCC guaranteed agricultural products.
OIC #40	PC #14	7/9/92	Facsimile with attachments	From Briskac to McKenzie (attaching Letter from [redacted] to Clark Re: traces and November 6 Typescript).
OIC #41		7/22/92	Letter	From Jameson to Richard Re: Diverted CCC guaranteed agricultural products.
OIC #42	PC #15	7/30/92	Memorandum	From Barsella to Clark Re: Final Report of the Italian Parliamentary Committee.
OIC #43		7/31/92	Letter	From McDowell to Jameson Re: CIA traces.
OIC #44	PC #17	8/4/92	E-Mail	From Clark Re: NSA documents concerning diversion of CCC guaranteed products.
OIC #45	PC #16	8/7/92	Memorandum	From Briskac to McDowell and Clark Re: Outstanding Requests for Information from Federal Agencies.
OIC #46	PC #19	9/1/92	Letter	From McDowell to Baker Re: [redacted]
OIC #47	PC #18	9/1/92	Letter	From McDowell to Holmes Re: CIA knowledge of BNL conduct.
OIC #48	PC #21	Undated	Letter	From Holmes to McDowell Re: CIA knowledge of BNL conduct.
OIC #49		9/4/92	E-Mail	From Meltzer to Briskac Re: CIA and DIA knowledge of BNL conduct.

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OIC #50		9/15/92	Summary	Transmitted from [redacted] to Meltzer. BNL Summary.
OIC #51	PC #4	9/15/92	Summary	Transmitted from Meltzer to Kelly. BNL Summary and underlying cables.
OIC #52	DH #7	10/8/92	Note and Attached Cables	From Jamesos to Urgenson (attaching November 17, 1989 cable and December 14, 1989 cable).
OIC #53	PC #13	3/11/91	Letter and Typescript	From [redacted] to Clark Re: Traces (attaching November 6 Typescript).
OIC #54		7/23/92	Memorandum for the Record	From [redacted] Re: Rep. Gonzalez allegations and discussion with McKenzie.
OIC #55		8/10/92	Letter	From [redacted] to Clark Re: CIA traces.
OIC #56		8/31/92	Facsimile Cover Sheet	From Meltzer to [redacted]. Drogoul's list of alleged CIA, NSA and DIA contacts.
OIC #57		9/1/92	Facsimile Cover Sheet	From Meltzer to [redacted] "Copy also faxed to David Holmes."
OIC #58		9/1/92	Facsimile Cover Sheet	From Meltzer to Holmes: "Copy also faxed to [redacted]
OIC #59		1/12/90	CIA Cable	Re: [redacted]
OIC #60	RM #7	9/18/92	Proposed Press Release	Re: CIA Summary provided to Congressman Gonzalez and underlying reports.
OIC #61		12/18/90	Letter	From Jamesos to Greenberg Re: CIA traces.
OIC #62		9/21/92	Handwritten Notes	Notes of September 21, 1992 meeting.

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OIC #63		9/23/92	Memorandum	From [redacted] for the Record Re: September 21, 1992 meeting. [redacted]
OIC #64		9/25/92	Letter	From Brill to Holmes Re: Judge Sboob's inquiries.
OIC #65		9/29/92	Letter	From Brill to Holmes Re: Judge Sboob's inquiries.
OIC #66		9/30/92	Letter	From Holmes to Brill Re: Judge Sboob's inquiries.
OIC #67		9/30/92 to 10/9/92	Draft Letters	Draft responses to Brill's letter concerning Judge Sboob's inquiries; October 9 letter from Rindskopf to Judge Sboob.
OIC #68		10/8/92	Facsimile Cover Sheet and Letter	Fax from [redacted] to Urgeason and Meltzer; Note from [redacted] to Meltzer (attaching part of 9/12/89 cable).
OIC #69	DH #8	10/8/92	Facsimile Cover Sheet and Cable	From [redacted] to Urgeason and Meltzer (attaching remainder of 9/12/89 cable).
OIC #70		10/8/90	Letter	From Greenberg to Allard Re: DIA traces.
OIC #71		10/17/90	Letter	From Berry to various DIA personnel Re: DIA traces.
OIC #72		10/15/90	Letter	From [redacted] to Berry Re: Traces
OIC #73		11/23/90	Letter	From Bathen to Greenberg Re: DIA traces.
OIC #74		9/15/89	DIA Cable	Re: Strategy to support Iraq in war against Iran.

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OIC #75		11/21/90	Routing and Transmittal Slip	From Bathen to GC Re: Release of [redacted] to DOJ.
OIC #76		12/19/90	Letter	From [redacted] to Berry Re: Traces.
OIC #77		1/2/91	Letter	From Bathen to Greenberg Re: DIA traces.
OIC #78		4/88	Cables	Cables.
OIC #79		1/2/91	Letter	From Bathen to Greenberg (enclosing June 1989 DIA Defense Research Comment).
OIC #80		6/29/89	Defense Research Comment	June 1989 DIA Defense Research Comment.
OIC #81		1/18/91	Memorandum	From Bathen to Morrison Re: [redacted]
OIC #82		2/11/91	Note	Note from Greiveldinger to Allard and Memorandum from O'Donnell Re: Indictment of foreign nationals (attaching 2/10/91 Revised Memorandum Urgeason to Mueller).
OIC #83		6/26/92	Letter	From Richard to Allard Re: Diverted CCC guaranteed agricultural products.
OIC #84		7/6/92	Memorandum	From Berry to various individuals Re: Diversion of CCC guaranteed agricultural products (attaching 6/26/92 letter from Richard to Allard).
OIC #85		8/3/92	Letter	From Berry to Clark Re: Diversion of CCC guaranteed agricultural products.
OIC #86		9/1/92	Facsimile Cover Sheet and Letter	From McDowell to Berry Re: DIA knowledge of BNL conduct.

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OIC #86-A		9/1/92	Letter	From McDowell to Berry Re: DIA knowledge of BNL conduct.
OIC #87		Undated	Handwritten Notes	List of names, DOBs and SSNs.
OIC #88		9/4/92	Letter	From Berry to Meltzer Re: DIA knowledge of BNL conduct.
OIC #89	PC #29	9/17/92	Letter	From Berry to Brill Re: DIA knowledge of BNL conduct.
OIC #90		12/7/89	Memorandum	From McKenzie to Warlow Re: Iraqi officials under investigation.
OIC #91	TG #15	10/9/90	Memorandum	From McKenzie to Greenberg Re: CIA and other Intelligence Community traces.
OIC #92		12/14/90	Letter	From McKenzie to Clark Re: State Department cables.
OIC #93		12/17/90	Memorandum	From Clark to McKenzie Re: State Department cables.
OIC #94		4/30/92	Memorandum	From McKenzie to Brinkac Re: Diversion of CCC guaranteed agricultural products.
OIC #95		6/30/92	Memorandum	From McKenzie to Horton Re: Customs investigation.
OIC #96		7/30/92	Memorandum	From McKenzie to Brinkac Re: Requests for intelligence information.
OIC #97		7/28/92	Facsimile Cover Sheet and Letter	From McKenzie to Brinkac (attaching 7/28/92 letter from Clark to Jamison Re: CIA traces).
OIC #98	RM #6	9/4/92	Letter and Summary	From Berry to Meltzer Re: DIA traces (attaching CIA Summary and Cables).

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OIC #99	PC #26	September 1992 Draft	Government Sentencing Memo	Draft Sentencing Memorandum Re: Drogoul.
OIC #100		9/10/92	Letter	From Brill to Cook Re: Gonzalez's document request.
OIC #101		9/16/92	Transcript	Testimony of Wade at Drogoul's sentencing hearing.
OIC #102	TG #5	2/13/90 [sic]	Agenda	Agenda of February 13, 1991 meeting between DOJ and USAO.
OIC #103		12/07/90	Cable	Legat officer warns that Ref. A contains information that is discoverable.
OIC #104		12/21/90	Cable	[redacted]
OIC #105		9/30/89	Cable	[redacted]
OIC #106		9/26/89	Cable	[redacted]
OIC #107		12/21/90	Cable	[redacted]
OIC #108		12/7/90	Cable	[redacted]
OIC #109		11/17/89	Cable	FBI Rep. comments that five-page report is discoverable and could reveal source if called to testify.

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OIC'S EXHIBIT NUMBERS	INDIV. EXHIBIT NUMBERS	DATE OF DOCUMENT	TYPE OF DOCUMENT	ADDRESSOR/ADDRESSEE DESCRIPTION OF TEXT
OIC #110	DH #10	F: 10/21/92 L: 1/31/90	Facsimile Cover Sheet and Letter	Fax from Urgeason to Meltzer (attaching letter to Kunkel Re: involvement of BNL-Rome managers).
OIC #111		3/16/92	Memorandum	From Clark to McDowell Re: Gonzalez's request for intelligence information.
OIC #112		3/9/90	Memorandum	From Rostow to Haass, Working and Deal Re: Iraq export credits.
OIC #113		5/21/90	Memorandum	From Rostow to Scowcroft Re: Indictment of Iraqi officials.
OIC #114		5/29/90	Memorandum	From Rostow to Gates Re: Iraq export credits.
OIC #115		5/29/90	Memorandum	From Charles (through Haass) to Gates Re: Iraq export credits.
OIC #116		6/8/90	Memorandum and Minutes	From Charles (through Haass) to Sitmann (attaching minutes of 5/29/90 NSC Deputies Committee Meeting.
OIC #117		2/8/91	Memorandum	From Rostow to Scowcroft (attaching prosecution memorandum) Re: indictment of Iraqi officials.
OIC #118		7/9/92	Letter	From Gray to President Re: Update of BNL matter.
OIC #119		5/27/92	Facsimile Cover Sheet and Outline	From Itoh to Rostow Re: Misconceptions regarding Iraq, BNL and CCC.
OIC #120		4/91	Handwritten Notes	Rostow notes of April 1991 meeting.
OIC #121		5/31/91	Handwritten Notes	Rostow notes of May 1991 meeting.
OIC #122		2/22/91	Memorandum	From Stillman to Rademaker Re: "Sanitized List" of Iraq License Applications.

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OIC #201	PC #1	1/26/90	Memorandum	From McKenzie to Richard Re: Status of BNL investigation.
OIC #202	TG #19	11/29/90	E-Mail	From Greenberg Re: NSC documents.
OIC #203	PC #10	2/1/91	Memorandum	From Clark to File Re: BNL-Rome's knowledge (MEED Article).
OIC #204	PC #2	6/3/92	Draft Chronology	BNL Events.
OIC #205	RM #4	6/23/92	Testimony	Mueller's testimony before the House Committee on the Judiciary.
OIC #206	RC #1	8/31/92	Press Report	New York Times article written by William Safire.
OIC #207	PC #20	9/1/92	Note	From Meltzer to Mueller Re: Intelligence information.
OIC #208	RM #5	9/1/92	E-Mail	From Meltzer to Saylor Re: Intelligence information.
OIC #209	PC #22	9/8/92	Letter	From Cook to McKenzie Re: Request for documents.
OIC #210	PC #23	9/8/92	Memorandum	From Clark to Brill Re: Cook's document request.
OIC #211	PC #24	9/9/92	Routing and Transmittal Slip	From Clark to Richard (attaching 9/8/92 memo from Clark to Brill and draft of 9/9/92 letter from Brill to Cook Re: documents).
OIC #212	PC #25	9/11/92	Memorandum	From Brinkac (through McDowell) to Urgenson Re: Requests for intelligence.

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OIC'S EXHIBIT NUMBERS	INDIV. EXHIBIT NUMBERS	DATE OF DOCUMENT	TYPE OF DOCUMENT	ADDRESSOR/ADDRESSEE DESCRIPTION OF TEXT
OIC #213	DH #2	9/14/92	Congressional Record	Gonzalez's statement before House of Representatives.
OIC #214	PC #27	9/14/92	Press Release	Re: CIA Knowledge of BNL conduct.
OIC #215	PC #28	9/15/92	E-Mails	Re: Gonzalez's statements.
OIC #216	PC #30	9/17/92	Letter	From Holmes to Brill Re: CIA knowledge of BNL conduct (faxed from [redacted] to Urgenson).
OIC #217	DH #3	9/92	Statement and E-Mails	Re: Gonzalez's statements and CIA letters.
OIC #218	DH #4	9/22/92	Letter	From Gonzalez to Gates Re: CIA letters.
OIC #219	DH #5	9/25/92	Letter	From Brill to Holmes Re: Judge Shoob's inquiries.
OIC #220	DH #6	9/30/92	Letter	From Holmes to Brill Re: Judge Shoob's inquiries.
OIC #221	DH #9	10/8/92	Note	From [redacted] to Meltzer Re: 9/12/89 cable.
OIC #222	DH #12	10/10/92	Statement	CIA Statement Re: CIA testimony before SSCI.
OIC #223	DH #11	August and October 1992	Facsimile Cover Sheet and Letters	Fax from Meltzer to [redacted] dated 10/28/92; Letter from Raul to Rindskopf, dated 8/6/92; Letter from Rindskopf to Raul, dated 8/14/92. All Re: Declassification of documents.
OIC #224	DH #1	Undated	Chart	CIA Organization Chart.

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OIC #225	PC #31	Undated	Facsimile Cover Sheet	From [redacted] to Clark Re: TDs released to DOJ in 1990 and 1991.
OIC #226	PC #12	Undated	Index	BNL Classified Document Index.
OIC #227	TG #6	Undated	Handwritten Notes	Greenberg notes of meeting.
OIC #228	CA #1	10/89	State Dept. Cable	BNL matter should be raised to a "political level."
OIC #229	RM #8	10/14/92	Letter to Editor	Raphaelson letter to editor of Washington Post: "Here's What Really Happened."
OIC #230	LK #8	9/9/92	Letter	From Stewart Baker to McDowell Re: NSA knowledge of BNL conduct.
OIC #231	LK #2	Undated	List	BNL list of relevant names.
OIC #301		Undated.	Outline	Outline of 1/11/91 meeting between USAO and DOJ.
OIC #302		Undated	Facsimile Cover Sheet and Letter	Fax from [redacted] to Meltzer (attaching 6/3/92 Boren letter).
OIC #303		1/28/91	Memorandum	From Clark to Taylor Re: Prosecution memorandum.
OIC #304		12/1/90	Rough Draft Memorandum	From Clark and Saylor to Urgeason Re: Proposed indictment.
OIC #305		10/19/90	Letter	From McKenzie to Blank Re: Matrix Churchill documents.
OIC #306		2/12/91	Letter	From Jameson to Richard Re: CIA traces.

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OIC #307		8/19/90	Memorandum	From Dennis to Mueller Re: BNL investigation.
OIC #308		9/12/89	CIA Cable	[redacted]
OIC #309		10/5/89	CIA Cable	[redacted]
OIC #310		10/20/89	CIA Cable	[redacted]
OIC #311		12/18/89	State Department Cable	Italian Treasury Minister, Guido Carli, testifies before Italian Senate that at least one high-level BNL-Rome official knew of BNL-Atlanta's unauthorized extension of export credits to Iraq.
OIC #312		4/20/90	CIA Cable	[redacted]
OIC #313		2/22/91	CIA Cable	[redacted]
OIC #314		11/17/89	CIA Cable	[redacted]
OIC #315		11/24/89	CIA Cable	[redacted]

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OIC #316		11/27/89	CIA Cable	[redacted]
OIC #317		10/5/90	E-Mail	From Richard to Mueller Re: CIA material.
OIC #318		5/14/90	FBI Cable	Information in 4/20/90 cable was either known, anticipated, or immaterial to BNL prosecution, except for allegation of fraud by U.S. automobile corporation.
OIC #319			USAO Response	USAO response to questions raised by Judge Marvin Shoob.

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Nancy Brinkac
Randy Chartash

VOLUME 3

[redacted]
Lawrence Eagleburger
John Frier

VOLUME 4

Theodore Greenberg
David Holmes
W. George Jameson
Lionel Kennedy

VOLUME 5

Gale McKenzie
Robert S. Mueller, III
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Richard Thornburgh
Laurence A. Urgenson
Arthur Wade
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PART II
THE BNL CABLE STORY

INTRODUCTION

Various Congressional Committees and others have made, or are making, inquiries as to whether the Department of Justice in Washington, D.C. ("DOJ"),[1] with the aid of the Central Intelligence Agency ("CIA"), deliberately withheld important information that may have affected the prosecution of employees of the Atlanta branch of Banca Nazionale del Lavoro ("BNL-Atlanta"). Specifically, it is alleged that they withheld information that individuals in the Rome headquarters of Banca Nazionale del Lavoro ("BNL-Rome") had contemporaneous knowledge of unlawful activities at BNL-Atlanta, and that the United States and Italian governments were also knowledgeable of, or even involved in, those activities. It is further alleged that this information was withheld from the Court presiding over the BNL matter, and from the prosecutors in the U.S. Attorney's Office in the Northern District of Georgia ("USAO").

To address those allegations, this part of my Report studies first, on pages 2 to 58, the initial requests for, and review of, intelligence information in the BNL case by the DOJ and the USAO from 1990 through August of 1992. Also examined is the process by which that information was gathered and disseminated by U.S. intelligence organizations, including the CIA, the Defense

[1] As set forth in Part I, the use of the term "DOJ" in this Report is defined to include only Main Justice in Washington, D.C. and not the U.S. Attorney's Office in Atlanta, although the latter is very much a part of the Department of Justice. The Atlanta U.S. Attorney's Office will be referred to as "USAO."

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Intelligence Agency ("DIA"), the National Security Agency ("NSA"), the National Security Council ("NSC") and the Department of State (collectively, the "Intelligence Community").

The Report then considers, on pages 59 to 94, the events that occurred in September 1992 that gave rise to the allegations at issue. Finally, the Report analyzes all these facts and reaches conclusions on pages 95 to 123. Although my analysis touches on other Departments and Agencies, I have focused on the conduct of the DOJ and the USAO.[2]

BACKGROUND

I. INITIAL CONTACTS BETWEEN DOJ AND THE USAO -- DECEMBER 1989 TO JUNE 1990

A. Early Review By DOJ

After the execution of search warrants at BNL-Atlanta on August 4, 1989, as is set forth in Part I of this Report, the Atlanta prosecutors established a Task Force made up of investigators from several different governmental agencies. This Task Force thereafter functioned as the investigative arm of the USAO and worked closely with that office.

In the Fall of 1989, the investigation proceeded with little contact between the DOJ and the USAO. Assistant to the Attorney General Robert S. Mueller, III ("Mueller") had some initial telephone discussions with the Atlanta prosecutors about the status of the case, but then ceased to have further involvement

[2]By necessity, there is some duplication between this Part II of the Report and Part I.

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for some time. Theodore Greenberg, the Acting Chief of the Fraud Section ("Greenberg"),[3] was generally aware of the prosecution, but was told by Mark Richard, the Deputy Assistant Attorney General-OIA ("Richard"), that Richard was "handling" the case. (Greenberg Tr. 5-6; Clark Tr. 6.)[4] Richard does not remember becoming involved until December 1989 or early 1990. (Richard Tr. 6.)

The USAO first requested the DOJ's assistance when Assistant U.S. Attorney Gale McKenzie ("McKenzie") wrote a memorandum, dated December 7, 1989, to Molly Warlow of the DOJ's Office of International Affairs, providing the names of four Iraqi nationals, who were targeted in the proposed indictment, for dissemination to the Intelligence Community. (OIC Ex. 90.) Sometime thereafter, Richard spoke with McKenzie about her proposal to travel to Turkey to interview witnesses, and to enter into a plea agreement with Entrade International, Ltd., a Turkish-owned, New York-based trading company. (Richard Tr. 6-7; Clark Tr. 4.) Richard was reluctant to endorse either proposal without a better grasp of the facts; thus on January 26, 1990, McKenzie sent a memorandum to Richard summarizing the status of the BNL investigation. (OIC Ex. 1; Richard Tr. 7; Clark Tr. 6-7; McKenzie Tr. 9-11.)

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[3]The titles and positions of the individuals referred to in the text are applicable to the time being discussed, unless otherwise noted.

[4]The references to "Tr." are to the transcripts of stenographically recorded interviews conducted during this preliminary investigation. These transcripts are included in the Appendix to this Report III, Volumes 1-7, and are arranged alphabetically. Exhibits will be referred to as "OIC Ex.," for Office of Independent Counsel, with a reference to the appropriate exhibit number.

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On January 31, 1990, DOJ Senior Litigation Counsel Peter Clark ("Clark") travelled to Atlanta at Richard's request to discuss the facts and the proposed theory of the case. The substance of that meeting is set forth in a memorandum from Clark to Greenberg dated February 12, 1990. (OIC Ex. 2; Richard Tr. 7-8; Greenberg Tr. 10, 11-12.) According to Greenberg, Clark also advised him orally that the USAO's investigation was inadequate at this point. (Clark Tr. 9-13; Greenberg Tr. 9-10, 12.)

DOJ's review of the BNL investigation continued through the Spring of 1990 during which time the USAO and DOJ held a series of meetings, attended at various times by Mueller, Laurence A. Urgenson, the new Chief of the Fraud Section ("Urgenson"), Richard, Greenberg, and Clark. (Clark Tr. 14, 26, 38; Greenberg Tr. 57-59; McKenzie Tr. 11-13.) According to Clark, one meeting in March lasted three days. (Clark Tr. 14.) On or about April 23, 1992, the USAO also sent a 100-page prosecution memorandum to DOJ, and it was circulated among attorneys there.

B. Initial Debate Regarding Whether BNL-Rome Knew

At each of these meetings, a principal issue discussed was whether BNL was a "victim" of unauthorized lending activity by Drogoul and other employees at BNL-Atlanta, or whether BNL officers outside of BNL-Atlanta had "contemporaneous" knowledge of that activity (that is, knowledge of the unauthorized loans prior to the August 4, 1989 execution of the search warrants). This issue, which was referred to in shorthand as whether "BNL-Rome knew," became the subject of heated debate. The USAO advanced the theory

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that BNL-Rome was an unknowing victim, for reasons set forth in a February 23, 1990 memorandum from McKenzie to Rukstele and in the USAO's April 23 prosecution memorandum. (OIC Ex. 204, p. 3; OIC Ex. 4; McKenzie Tr. 20-23.)

Attorneys at DOJ were not convinced that the USAO's theory was correct. Richard and Greenberg, for example, were both skeptical about how BNL-Atlanta officials could have made such large loans without someone at BNL-Rome knowing of their activities, and they were not convinced that the investigation had been thorough enough to reach any firm conclusion on this issue. (Greenberg Tr. 52-57, 62; Richard Tr. 8-9, 10-12.) Clark not only thought that the investigation was inadequate and that the reasons in McKenzie's February 23 memorandum were unpersuasive, he also believed that the USAO was too dependent on the assistance of BNL-Rome's counsel on this issue. (Clark Tr. 29-37; Greenberg Tr. 63, 68-70.)

Clark's memorandum to Greenberg, summarizing his January 31, 1990 meeting with the USAO, expressed "serious reservations" about the prosecution theory that BNL was a victim of fraud. Clark stated:

> This [BNL-Atlanta off-book lending scheme] was the direct result of the actions of BNL officers and employees--whether or not instigated by Tedzeller or anyone else--and BNL is responsible for the actions of its officers and employees.

Clark added in a footnote:

> The U.S. Attorney's office is very reluctant to charge BNL, primarily because the bank has cooperated fully in the investigation and has

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> questioned the theory under which the Department could charge BNL for the unauthorized acts of its officers and employees.

(OIC Ex. 2, p. 2 and fn. 5.)[5]

Clark's continuing reservations about "the knowledge or complicity of other BNL officers or employees (particularly in New York and Rome)" were expressed in a memorandum to Urgenson, dated May 9, 1990, that commented on the April 1990 prosecution memorandum. (OIC Ex. 5, p. 2.) (Emphasis in original.) Clark's memorandum again criticized the adequacy of the investigation as to BNL-Rome's knowledge, noting that the USAO had not yet completed the questioning of BNL's external or internal auditors.

Clark's memorandum also cited a report of the Central Bank of Italy, dated March 30, 1990, that was inconsistent with the USAO's position that BNL-Rome did not know. According to Clark's memorandum:

> The CBI [Central Bank of Italy] report notes particularly that while the subject transactions were the result of deliberate malfeasance on the part of the Atlanta agency "they were perpetrated din [sic] an organizational context of inadequate auditing of the bank's North American branches" and that "[o]f special significance in this respect were the failure to create proper accounting procedures operations with correspondent banks. . .." The correspondent bank transactions were the very mechanism by which the scheme was carried out and these transactions left the trail that

[5]The memorandum also noted that treatment of BNL-Rome as a victim might prevent the U.S. from bringing a civil action against BNL for losses on the CCC-guaranteed loans if Iraq ultimately defaulted on those loans. Mueller and Urgenson state that the DOJ's ultimate decision not to indict BNL-Rome was made independent of considerations of whether a civil recovery was available from BNL-Rome. (OIC Ex. 2, p. 3.)

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> could have been followed. . .. Given these conclusions by the CBI. . .. I have serious reservations that BNL the entity was not culpable or the adequacy of the USAO investigation which led to this conclusion.

(OIC Ex. 5, p. 3.)

As discussed below, this debate continued up until shortly before the Indictment was filed in February 1991.[6]

II. INITIAL DISCUSSIONS REGARDING REQUESTS FOR INTELLIGENCE COMMUNITY INFORMATION -- DECEMBER 1989 - AUGUST 1990

Against this background, the issue of intelligence information requests was first discussed at DOJ by Greenberg, Clark and Urgenson in February 1990.[7] Greenberg recalled recommending that a meeting be held with representatives of all the U.S. intelligence agencies, in order to advise them of the investigation, to establish a thorough process for obtaining intelligence information, and to discover any potential "greymail" defenses to the prosecution. According to Greenberg, Urgenson advised him to hold off commencing this process, but Urgenson, did not remember giving any such instruction. (Greenberg Tr. 17-20, 22-23, 45-49,

[6]During 1990, relations between Clark and McKenzie became strained, which ultimately caused Clark to limit his involvement in the case by September 1992. One incident that created friction from Clark's point of view occurred during the three-day meeting in March 1990. Clark allegedly asked for a copy of a Federal Reserve report on the BNL scandal, and McKenzie responded that the Federal Reserve would not let them see that report. Clark later learned that this was incorrect. (Clark Tr. 40-44, 168; Greenberg Tr. 60, 63, 97.)

[7]As set forth above, the subject had been raised previously by the USAO in December 1989, when McKenzie wrote to OIA's Warlow providing the names of four Iraqi nationals for dissemination to the Intelligence Community. There is no record of a response to this request by DOJ or the Intelligence Community.

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86.) Urgenson noted that he relied heavily on the judgment of the DOJ's intelligence community experts, Greenberg and Clark, since he was a relative newcomer to DOJ. (Urgenson Tr. 58-60.)

Clark had a different recollection entirely. His position is that the USAO had the principal responsibility for handling the intelligence issue, and he characterized the involvement of DOJ in the BNL matter generally as "off and on." (Clark Tr. 25-28, 46-48; see Greenberg Tr. 41-44, 86.) A memorandum from Clark dated July 12, 1990 seems to support his recollection. The memorandum noted that intelligence inquiries should have been made much earlier, and that when Clark had previously asked the USAO about their efforts to obtain records from the Intelligence Community, he had been told that the FBI was handling the issue. Clark also stated that he had specifically asked McKenzie "whether Drogoul, his counsel, or anyone else had ever intimated that BNL-Atlanta's lending was caused or promoted by the U.S. government -- i.e., a potential 'greymail' defense -- and was told 'No'." (OIC Ex. 8, p. 1; Clark Tr. 57-63.)

By contrast, the USAO believed that DOJ had assumed responsibility for all Intelligence Community matters. (McKenzie Tr. 39-40; Greenberg Tr. 46; Wade Tr. 20; Rukstele Tr. 40-42.) For example, Rimantis Rukstele, then First Assistant U.S. Attorney for the Northern District of Georgia ("Rukstele"), specifically remembered that Urgenson requested Greenberg and Clark to handle the matter of gathering Intelligence Community information at a meeting in DOJ's Command Center in April 1990. (Rukstele Tr. 24-26.)

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Rukstele believed that this assignment was appropriate because Greenberg and Clark had the required security clearances and experience in the Intelligence Community, unlike any members of the USAO, and both were also completely familiar with the issues involved in the BNL investigation and prosecution. (Rukstele Tr. 24-26.) Rukstele recalled:

> One of the reasons that I wanted Fraud Section's participation and involvement in this case was precisely because they are in a better position to drive over to Langley and do what is necessary at Langley. They have the clearances. They've done it before. They know how to do it. It's much easier for them. Fraud Section was in a better position to take care of this than a line assistant working the case in Atlanta.[8]

Because McKenzie was otherwise occupied with an unrelated trial during the early summer of 1990, Rukstele sent a letter to Richard, dated July 3, with a copy to Urgenson, advising DOJ of the status of the BNL investigation and making certain requests of DOJ.[9] (OIC Ex. 7; Rukstele Tr. 36-37.) Rukstele's July 3 letter did not request information on the specific issue of whether "BNL-Rome knew." Rather, it asked for intelligence on "what knowledge and role, if any, the Central Intelligence Agency had or played in

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[8]These differing views as to who had ultimate responsibility for requesting, reviewing, and following up on intelligence information continued throughout this matter, as described below, and undoubtedly contributed to the confusion surrounding the events in September 1992.

[9]Rukstele's July 3 letter also stated that arrangements were being made to interview Wafai Dajani ("Dajani"), an associate of Christopher P. Drogoul ("Drogoul"), because Dajani had purportedly stated that "BNL-Rome knew" of irregularities in Atlanta.

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BNL dealings with foreign governments in general and Iraq more specifically." The letter further stated:

> I cannot over emphasize to you the importance of the answers to these questions to our overall investigation. As you well know, experience has demonstrated that CIA knowledge and participation can seriously impact a decision to prosecute.

(OIC Ex. 7, p. 2) As written, the letter appeared to focus more on "greymail" defense issues than on confirming or contradicting the USAO's theory that BNL-Rome was a "victim." (Clark Tr. 64-65; Greenberg Tr. 89-91; Rukstele Tr. 37-40.)

At Urgenson's request, Greenberg then contacted the intelligence agencies directly, starting with the CIA, in a memorandum, dated August 3, 1990, to [redacted] Assistant General Counsel, CIA [redacted]. Greenberg's inquiry was not limited to the issue of whether the CIA had any knowledge of, or participation in, BNL-Atlanta's unauthorized lending activity. He expanded the request to seek an "all component search" for any information that the CIA had regarding BNL by framing three broad areas of inquiry:

> (i) to determine whether the CIA had any information about BNL (or certain individuals) generally, or whether the CIA had any relationship with them, or whether there were reasons that any of their indictments "should not be sought or would compromise intelligence equities";
>
> (ii) confirmation on the death of a proposed defendant, Sadik H. Taha, Director General for Agreements and Loans, Central Bank of Iraq, an Iraqi national; and
>
> (iii) information on whether BNL loan proceeds were used for the purchase of sidewinder

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missiles and/or parts or technology for the Condor missile.

(OIC Ex. 10, p. 2; Clark Tr. 66; Greenberg Tr. 104-109.)

According to Greenberg, he made it very clear to [redacted] and W. George Jameson, Associate General Counsel at the CIA ("Jameson"), in telephone conversations, that his request included any information regarding whether "BNL-Rome knew." (Greenberg Tr. 109-113, 115; Clark Tr. 66.)

The requests were handled entirely by the Fraud Section of the DOJ's Criminal Division. At around this time, Mueller was generally aware of, but did not actively participate in, the requests for information from the Intelligence Community. He received a memorandum, dated August 19, 1990, from then-Assistant Attorney General Edward S.G. Dennis, Jr. that briefly described the facts of the case and the scope of the anticipated indictment, and stated: "At request of the (Atlanta) United States Attorney's Office, the Fraud Section is making appropriate inquiries to determine whether the Central Intelligence Agency knew of, or participated in, BNL's dealings with foreign governments and nationals."[10] (OIC Ex. 307; Mueller Tr. 17.)

During the Spring of 1990, Urgenson attended meetings with State Department and NSC officials, including Nicholas Rostow, Special Assistant to the President and Legal Advisor, NSC. The purpose of these meetings was to keep the Intelligence Community

[10]A draft memorandum, dated August 13, 1990, from Dennis to William P. Barr, then-Deputy Attorney General, briefly summarized the status of the BNL case, but omitted any mention of CIA or Intelligence Community inquiries. (OIC Ex. 11.)

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informed of the status of the BNL case. According to the DOJ and USAO representatives who attended these meetings, there were no pressures or preferences, subtle or otherwise, expressed at these meetings to shape or limit the scope of the BNL Indictment.[11] (Urgenson Tr. 43-47; McKenzie Tr. 25-28; Rukstele Tr. 30-34; Rostow Tr. 31-32.)

III. INFORMATION GATHERED AND DISSEMINATED BY THE INTELLIGENCE COMMUNITY -- SEPTEMBER 1989 - FEBRUARY 1991

The Intelligence Community had been gathering and disseminating information in the normal course regarding BNL-Atlanta's activities long before Greenberg's August 3, 1990 request to the CIA. This section of the Report examines the gathering and dissemination of information by the Intelligence Community in order to define the context in which specific information was ultimately transmitted by the DOJ in response to Greenberg's requests.

A. Intelligence Reports Gathered

[redacted] stated that the CIA became aware of the BNL scandal through media reports in September 1989, and began gathering information and submitting reports shortly thereafter. The first report was filed on September 12, 1989. [redacted] Tr. 5-6,

[11]OIC Ex. 6 describes the proposed agenda for such a meeting, scheduled for May 29, 1990 at the Old Executive Office Building. The location of the meeting was later changed to the State Department.

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17-20.) In response, the CIA headquarters sent a cable dated 15 September 1989[12] [redacted] which stated: [redacted]

[redacted]

Over the next 17 months, [redacted] submitted a number of reports on the BNL scandal. [redacted] All reports were submitted to CIA headquarters for review and dissemination, although some reports were not disseminated outside the CIA for reasons discussed later in this Report. [redacted] Tr. 11, 17-20.) [redacted]

The Directorate of Intelligence ("DI") at the CIA was also following the BNL scandal, and was gathering information and preparing reports. [redacted], former Economic Analyst on Iraq, stated that she followed the BNL scandal by reading the daily

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[12]This form of date and year is commonly used by the Intelligence Community in their cables and other intelligence information. Therefore, we are adopting that usage when referencing such materials within this Report.

[13]CIA headquarters circulated a cable dated 26 September 1989 [redacted] that listed a series of questions raised by the "unfolding" BNL scandal. (OIC Ex. 106.) On that same day, [redacted] sent a cable to headquarters [redacted] "attempting to respond to HQs requirements for reporting information on the current [BNL] scandal." The cable asked for guidance on whether to report on U.S. persons or domestic events, [redacted] (OIC Ex. 105.) [redacted]

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electronic intelligence reporting, the newspapers, and some exclusive reporting from the Directorate of Operations ("DO") and the State Department. In late September or October 1991, [redacted], also of the CIA, prepared a typescript[14] dated 6 November 1989 (the "6 November Typescript") on the repercussions of the BNL scandal. [redacted] however, was not sure whether her information regarding what "BNL-Rome knew" was limited to press reports. ([redacted] Tr. 5-20.) [redacted]

[redacted] Single reports from both the DIA and the State Department, as well as some of the CIA reports, contained information on the issue of whether BNL officials outside of Atlanta knew about BNL-Atlanta's unauthorized loans to Iraq. In particular, ten intelligence reports between September 1989 (approximately one month after the August 4 search of BNL-Atlanta) and February 1991 (when the Drogoul indictment was returned) have been identified as suggesting that "BNL-Rome knew." The relevant portions of those cables are summarized as follows: [redacted]

1. The 12 September 1989 DIA cable:

[redacted]

[14] A "typescript" is a finished intelligence memorandum prepared by the CIA's Directorate of Intelligence.

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[redacted]

This information was submitted by [redacted] (OIC Ex. 74.) It is unclear whether the cable was disseminated outside the [redacted] at the time. [redacted]

2. The 12 September 1989 CIA operations cable:

[redacted] (OIC Ex. 308.)

3. The 5 October 1989 CIA intelligence cable:

[redacted]

[redacted]

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[redacted]

4. The 20 October 1989 CIA intelligence cable:

[redacted]

This cable was submitted by the CIA's [redacted] and was disseminated on or around October 20, 1984 to the FBI and other governmental departments, but not the DOJ. (OIC Ex. 310.) [redacted]

5. The 6 November 1989 CIA Typescript:

This report was prepared by the CIA's Directorate of Intelligence and stated, inter alia, that: "BNL's North American headquarters in New York and the bank's directors in Rome publicly denied knowing about the letters of credit, although a BNL official in [redacted] claims he notified New York and Rome several times about the unusual activity in Atlanta, according to press reports. Press reports also indicate a BNL branch in Udine, Italy referred customers exporting to Iraq to the Atlanta branch." (OIC Ex. 14, p. 2.)

This typescript was sent to the Department of Agriculture on January 31, 1990 (see subparagraph 8, below), to Clark at DOJ on March 11, 1991. (OIC Ex. 14.)

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6. The 18 December 1989 State Department cable:

This cable [redacted] stated that "[a]ccording to press reports, Treasury Minister Guido Carli confirmed during testimony before the Senate Finance Committee on December 14 that several employees in the [BNL] Rome office, including one high-level official, knew of the unauthorized extension of credits in favor of exports to Iraq by the Bank's branch in Atlanta. . .. The Rome connection was reportedly uncovered through a series of telexes and faxes between the Italian headquarters and the Atlanta branch . . . involv[ing] the Udine-based company Danieli's request for financing. . .."

According to the header on the cable, it was disseminated to the DOJ on or about December 18, 1989. (OIC Ex. 311.)

7. The 12 January 1990 CIA intelligence cable:

[redacted]

This cable was submitted [redacted] and was disseminated on or about January 12, 1990 to the FBI and other governmental departments, but not the DOJ. (OIC Ex. 59.) (C)

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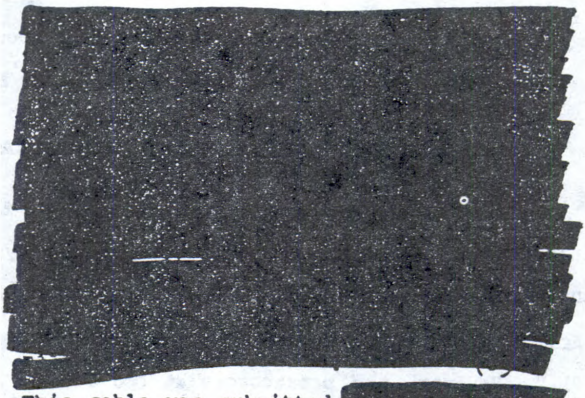
8. The 31 January 1990 CIA letter:

This letter from [redacted] of the CIA's Directorate of Intelligence, Iran-Iraq Branch, Persian Gulf Division, Office of Near Eastern and South Asian Analysis, to David Kunkel, Office of the General Sales Manager, Foreign Agricultural Service, Department of Agriculture, transmitted the 6 November Typescript (OIC Ex. 14) listed in subparagraph no. 5, above. The 31 January letter stated that "new information has come to light that. . . managers at BNL headquarters in Rome were involved in the scandal." [redacted]

This letter was not disseminated to the DOJ or the FBI until October 1992. (OIC Ex. 110.) [redacted]

9. The 20 April 1990 CIA intelligence cable:



This cable was submitted [redacted] and was disseminated to the FBI, the DOJ and other governmental departments on or about April 20, 1990. (OIC Ex. 312.) [redacted]

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10. The 22 February 1991 CIA intelligence cable:

[redacted]

This cable was submitted by [redacted] and was disseminated to on or about February 22, 1991 to the DOJ, the FBI, and other governmental departments. (OIC Ex. 313.)[16] [redacted]

B. Dissemination Of Intelligence Information To The DOJ And The FBI

As noted in the list above, some of this intelligence information was disseminated contemporaneously through normal channels to the FBI headquarters, to the FBI Atlanta field office (see items 3, 4, 7, 9 and 10), and to DOJ (see items 6, 9 and 10).[17] However, the prosecutors at DOJ and in Atlanta who were working on the BNL investigation did not receive this information through those normal channels. The explanation for this lies in

[16]This cable is inaccurate. [redacted]

[17]The CIA says that the failure to disseminate the other cables to the DOJ at the time was either an oversight or viewed as unnecessary because the other cables had been sent to the FBI. [redacted] Tr. 63-64.) [redacted]

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the way intelligence information is normally received and routed by the DOJ and the FBI when it is received from the Intelligence Community, and the limitations on who may review this information.

1. Routing Cables At the DOJ

Intelligence Community reports that are disseminated to the DOJ electronically are sent to either the DOJ Message Center in the basement of the DOJ Building in Washington, or to the Command Center on the sixth floor.[18] The Command Center receives all cables that are "Top Secret - Codeword" or that concern emergency or "crisis" matters. Cables on routine matters are sent to the Message Center even if they are classified "Top Secret," "Secret," or "Confidential." (Rubino Tr. 7, 19-21.)

When a cable is received electronically at the DOJ, it is printed out and then routed by the Message Center or Command Center to the particular division or attorney within the DOJ to whom the cable is addressed. If the cable does not indicate which particular division or attorney should receive the information, the Message Center or Command Center staff exercises its judgment on who should receive the information based on the subject matter of the cable. Jerry Rubino ("Rubino"), Chief of Security at the DOJ, states that the Command Center staff has sufficient experience to know where to route all emergency or top secret-codeword cables, and to ensure that whoever receives the cables has the proper clearance. (Rubino Tr. 12-14, 19, 21, 24.) I regard this

[18]Intelligence Community information is also received by individual DOJ attorneys by mail or by courier.

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assurance with skepticism, however. Further, there is no evidence that the Message Center, which receives numerous cables every day on routine matters, has the same ability to route cables properly.

The DOJ cannot confirm whether the cables at issue were properly routed in the September 1989 - February 1991 period. The Command Center has a hard-copy and computer log for every cable received and routed within the DOJ, and retains that log for only one year. The Message Center retains a log for just 30 days. There is no central records repository where cables are catalogued and filed after they have been routed within the DOJ. (Rubino Tr. 9-11, 24.)

No one in the Fraud Section of the Criminal Division at DOJ recalls receiving the intelligence information listed in Items 8 and 9 above, even though Item 9 indicates that it was disseminated to DOJ. Richard recalls having received numerous cables on a regular basis as part of his responsibilities in international affairs, but he has no recollection or record of receiving any cables concerning BNL. (Clark Tr. 48, 52; Richard Tr. 20-25, 28-32.) The Atlanta prosecutors did not have security clearance to review classified information until April 1991, and accordingly they did not receive these cables when they were disseminated. (McKenzie Tr. 39, 56.)

2. Routing Cables At the FBI

The process for routing cables at the FBI in the September 1989 - February 1991 period was more structured. The cables were received electronically at the FBI Communications

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center, and routed in hard copy form to the specific individual or entity identified on the "pass line."[19] If no person or entity was identified, the cable was routed according to the unit or section most likely to be involved in the subject matter of the cable. The Unit or Section Chief in turn forwarded the cable to the appropriate Supervisory Special Agent. Any of these persons could forward the information to another unit or section or to a field office. The information could also be marked for indexing and storage on a computer by the Information Services Section, and later be retrieved by searching for the date, the sender, or the subject matter. Hard copies of all cables were eventually stored according to general subject matter in the central records system at FBI headquarters. The FBI's review of these hard copies shows that the CIA cables listed as Items 3, 4, and 6 above were routed to Division 6 (Criminal) at headquarters, and to the Atlanta field office (no indication as to any individual).[20]

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[19]After October 7, 1991, Top Secret or compartmented information was sent to the Special File Room, where a control form was attached to establish the chain of custody.

[20]The FBI headquarters files show that at least one CIA cable, dated 20 April 1990, was followed up on by Gregory D. Meacham, Supervisory Special Agent, FBI, who sent a teletype to the Legal Attaché in Rome on May 14, 1990. That teletype stated in part:

> The information contained in [the cable] was either known, anticipated, or inmaterial [sic] to the prosecution [redacted]

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c. Non-Dissemination Of Certain Cables

Four CIA intelligence cables were never disseminated outside the CIA, even though they were submitted [redacted] for dissemination by headquarters. Those cables are: [redacted]

1. The 17 November 1989 CIA intelligence cable:

[redacted] (OIC Ex. 314.)

2. The 24 November 1989 CIA intelligence cable:

[redacted] (OIC Ex. 315.)

3. The 27 November 1989 CIA intelligence cable:

[redacted] (OIC Ex. 318.)

Robert Peter, [redacted] remembers receiving this teletype and thinking that FBI headquarters was on top of the relevant CIA traffic regarding BNL. (Peter Tr. 39-43.)

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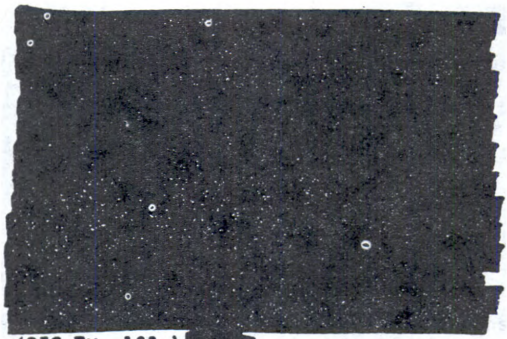
[redacted] (OIC Ex. 316.) [redacted]

4. The 7 December 1990 CIA intelligence cable:



(OIC Ex. 108.) [redacted]

The CIA operational cable [redacted] accompanying the 17 November 1989 intelligence report [redacted] states that the FBI "Legat" [redacted] had advised [redacted] that the report was "discoverable" and could conceivably result in the source of the information being called as a witness in the BNL trial in Atlanta. [redacted] asked for comments from headquarters on this advice. Similarly, the CIA's operational cable [redacted] accompanying the 7 December 1990 intelligence report [redacted] states that: "'Legat' officer recommended against submission of the [report] noting that every paragraph contains damaging information which is 'clearly discoverable.'" (OIC Ex. 103; [redacted] Tr. 55-62, 69-74.) [redacted]

[redacted] who prepared these cables, stated that the Assistant FBI "Legat" did in fact give this advice, but that [redacted]

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[redacted] nonetheless recommended dissemination. [redacted] did not consider this advice to be pressure or influence to withhold or conceal intelligence information regarding the BNL scandal. [redacted] Tr. 6-17.) Peter denied ever having suggested that CIA intelligence reports not be submitted. He stated that he simply advised that discoverability of intelligence information was a possibility given the existence of an ongoing criminal proceeding, and he never believed that this would result in the intelligence not being disseminated. (Peter Tr. 26-27, 32-33, 62-68.) [redacted] the Deputy Reports Officer at CIA headquarters, testified that the only reason the three 1989 intelligence reports listed above were not disseminated was because they reflected information already reported in the London Financial Times newspaper, and that the 1990 intelligence report listed above was factually unsupported. She denied that the CIA withheld any reports from dissemination based on pressure or influence by the FBI "Legatt" [redacted] or by anyone else at DOJ. [redacted] Tr. 27-32, 36-41.) [redacted]

[redacted] testimony is supported by the cables that CIA headquarters was sending [redacted] at the time. Specifically, a cable dated 14 December 1989 [redacted] from CIA headquarters advises [redacted] that the 17 November [redacted], 24 November [redacted], and 27 November [redacted] 1989 intelligence cables would not be disseminated because they repeated information already reported by the London Financial Times. (This 14 December 1989 cable also notes that the "discoverability" of

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intelligence was not a real concern.) Similarly, a cable dated 21 December 1990 [redacted] states that headquarters had decided not to disseminate the 7 December 1990 intelligence report because the source "did not appear to have any factual foundation for these allegations. We would be very interested in reporting on this topic if station is able to obtain more detail. . .." (OIC Ex. 104; [redacted] Tr. 58-62, 69-75; [redacted] Tr. 21-22.) [redacted]

IV. DOJ RECEIVES INTELLIGENCE INFORMATION FROM THE CIA, IN RESPONSE TO ITS INITIAL REQUESTS -- AUGUST 1990 - OCTOBER 1990

Having described the intelligence information actually gathered and disseminated in the normal course on the subject of whether or not "BNL-Rome knew," I shall now turn to the specific requests by the DOJ for intelligence information in the BNL investigation.

A. The CIA's August 24 Interim Response

The CIA provided an "interim response" in a letter, dated August 24, 1990, from Jameson to DOJ's Greenberg. (OIC Ex. 15) The letter stated that a "preliminary review" had found a "significant amount of information" relating to three of the individual names Greenberg had provided, a "limited amount of information" as to twelve of the names, no information as to ten of the names, and that it was not yet clear whether the CIA had operational relationships with any of the names. The letter further stated that additional information would be provided once "component processing" had been completed. Jameson stated that the current situation in

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Iraq had caused CIA offices to be "quite busy" and made it difficult for a faster response, but Jameson noted that an earlier response would be possible if Greenberg had any specific questions. (OIC Ex. 15.)

Although the DOJ's August 3, 1990 memorandum request had been addressed to [redacted], Jameson had received the memorandum from [redacted] and believes he assigned the project to a paralegal, [redacted] Jameson viewed the DOJ's BNL request as "routine" and he did not review any of the information obtained by the CIA in its search. In signing the August 24, 1990 "interim response" letter, Jameson apparently took it for granted that [redacted] had contacted the appropriate CIA components and had properly executed the search.[21] (Jameson Tr. 15-22, 24-25.)

Greenberg wrote an E-Mail to Urgenson on August 24, 1990 summarizing information that he had received from Jameson's "interim response." (OIC Ex. 12.) Greenberg's memorandum noted:

> CIA will process the materials as soon as possible, but, given the situation in Iraq they don't feel they will be able to finish until early September. Baring [sic] some exigent circumstance on our part I suggest we do not press them at this time. (OIC Ex. 12, p. 1.)

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[21]Jameson is not completely certain that he assigned the project to [redacted] although he refers to [redacted] in his letter to Greenberg. According to Jameson, it was not unusual for attorneys within the CIA's Office of General Counsel ("OGC") to have letters for their signatures prepared by subordinates and for attorneys to sign such letters without detailed review. The general philosophy in the OGC was that "you don't want to micro-manage staff" and, in the metaphor of General Counsel Elizabeth Rindskopf, "we want thoroughbreds and we want . . . to let them run." (Jameson Tr. 73-74.)

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B. The CIA's October 2 Response

By letter to Greenberg dated October 2, 1990, Jameson supplemented the CIA's earlier response by citing certain information "relating to BNL transactions in financing activities in Iraq" and annexing classified exhibits in response to Greenberg's request for information on the named individuals. (OIC Exs. 17 and 18, respectively.)[22] The classified exhibits included responses in connection with the names provided by Greenberg and referred to 28 "intell reports" (or cables) that "may be passed on to Justice." (OIC Ex. 18, pp. 1-2, 5-7, 9-11.) The October 2, 1990 letter also referred to the existence of classified documents originated by the State Department, NSA and DIA.[23]

An E-Mail from Richard to Mueller dated October 5, 1990 suggests that DOJ was also aware of the CIA cables that came in the October 2 response. The E-Mail reads:

> What a way to start the day - Greenberg tells me he has received some interesting material from CIA which he wants to bring to our attention. Just an alert.

(OIC Ex. 317.) Neither Greenberg nor Richard remembered reviewing any CIA materials with Mueller at the time.

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[22]As with the CIA's August 24 "interim response," Jameson did not personally review any of the information gathered by the CIA. A distribution list attached to Jameson's copy of his October 2 letter to Greenberg indicates that the letter was prepared by [redacted] for Jameson's signature. (Jameson Tr. 28-31.)

[23]The CIA was unable to provide the DOJ with such documents because of the "third agency rule," which provides that only the originating agency can disseminate its documents. [redacted] Tr. 31-32; Jameson Tr. 33-34, 36.)

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Although Greenberg and Clark generally remembered reviewing intelligence materials attached to this CIA letter, they do not recall which specific information they reviewed.[24] Greenberg's review seems to be confirmed by the fact that Urgenson recalls taking notes on information provided by Greenberg regarding the CIA's October 2 response that same day. Urgenson's typed notes included the following observations:

3. [redacted]

4. [redacted]

5. [redacted]

6. [redacted]

[24]Greenberg, who recalls having seen the CIA cables dated 5 October 1989, 12 January 1990, and 20 October 1989 that are referred to above, has no recollection of having seen the other intelligence information suggesting that "BNL-Rome knew." (Greenberg Tr. 120-143.) Similarly, Clark recalls having reviewed all the CIA cables provided back in that time frame, but has no recollection of any specific cables. Clark is fairly sure that all the CIA cables received on October 2, 1990 are listed on the April 1992 index prepared by Nancy Brinkac. (Clark Tr. 76-85, 95-106.)

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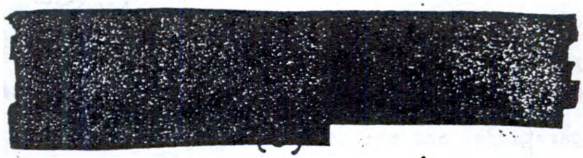

(OIC Ex. 12.)

Although Urgenson could not recall seeing specific CIA cables, his notes suggest that on October 2, 1990, Greenberg informed him of the substance of at least four CIA intelligence cables dated 15 September 1989, 12 January 1990, 5 October 1989, and 20 April 1990, respectively. The last three cables suggest that some BNL-Rome officials may have had contemporaneous knowledge of the unauthorized loans by BNL-Atlanta.

V. ADDITIONAL DOJ REQUESTS FOR INTELLIGENCE INFORMATION FROM ALL THE AGENCIES, AND RESPONSES TO THOSE REQUESTS -- OCTOBER 1990 -- MARCH 1991

A. The DOJ Letter Requests

Greenberg followed up on Jameson's October 2 response that, inter alia, referred to documents originated by other agencies (i.e., the "third agency rule"). He sent letters, dated October 8, 1990, to Jameson at the CIA (OIC Ex. 20), William J. Allard, General Counsel, at the DIA (OIC Ex. 70), and to the NSC and State Department. In addition, Greenberg sent a similar letter request for BNL-related information to the NSA on October 12, 1990.[25]

[25]Greenberg sent the October 8 letter to Jameson at the CIA as well, just to be sure that the search was as complete as possible. (Greenberg Tr. 161.)

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Greenberg's October 8 and October 12 letters broadly requested "any information . . . relating to BNL, its Atlanta agency operations, and the Italian and Iraqi governments," among other things. The letters also sought information about those agencies' relationships with 31 listed individuals and companies and "whether BNL funds were used directly or indirectly for the purchase of implements of war or dual use items which can be used in the manufacture of implements of war." Finally, the letters updated the list of individual names that Greenberg had sent to the CIA with his August 3 letter, and it limited the search to the time period beginning March 1986. Greenberg believed that these broad requests also called for information on whether BNL-Rome knew, as well as many other subjects. (Clark Tr. 109-110; Greenberg Tr. 114-115, 162-163.)

B. The CIA's Supplemental Response - December 1990

On December 18, 1990, the CIA wrote a third response letter to Greenberg as part of its overall response to the DOJ inquiries for BNL intelligence information and, specifically, Greenberg's October 8 letter. (OIC Ex. 61.) The December 18 letter reiterated that the CIA had received cables disseminated by the State Department, and that it was referring those cables to the State Department for its further review and a direct response to Greenberg's requests at DOJ.[26] In total, the CIA provided over 100

[26]In letters dated October 19 and December 19, 1990, the CIA referred such cables to the State Department and DIA. (OIC Ex. 76.)

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cables, intelligence reports and summaries to the DOJ in response to the Greenberg requests. However, most of those cables did not relate to the issue of whether "BNL-Rome knew."

C. The DIA Response - November 1990

The DIA provided an interim response to Greenberg's October 8 request by letter, dated November 23, 1990, from Terry E. Bathen, Assistant General Counsel ("Bathen"). (OIC Ex. 73.) Bathen had received the assignment to prepare the DIA's response from Robert H. Berry, Jr., Deputy General Counsel ("Berry"). Bathen's letter to Greenberg included three intelligence reports that the DIA considered responsive. (OIC Ex. 74)

One of those reports, as discussed above, was a cable prepared by [redacted] bearing serial number [redacted] and dated September 12, 1989 [redacted][27]

[redacted]

[27]According to Berry, [redacted] was "over classified" as "secret specat" (special category), a designation reserved for reports of greater national security concern. (Berry Tr. 15-16.)

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(OIC Ex. 74.)

[redacted] drew the interest of Greenberg and Clark at DOJ and they arranged to meet with [redacted] and Bathen in January 1991. (Berry Tr. 17, 21-23, 34-37.) Bathen's memorandum of that meeting, dated January 18, 1991, indicates that [redacted] said he may have written a second report or draft on the issue. (OIC Ex. 81.) The DIA conducted a search for a second such report or draft, but found nothing on file. Bathen later told Berry that when he told [redacted] that the DIA had been unable to locate any drafts of such a second report, [redacted] expressed uncertainty as to whether he had in fact written such a report. (Berry Tr. 35-36.) After that meeting, Greenberg and Clark believed that [redacted] had inflated the extent of his source's knowledge and did not believe the [redacted] report to be significant. (Berry Tr. 17; Clark Tr. 121.) According to Berry, Bathen reached the same conclusion from the meeting. (Berry Tr. 16-17.)

The DIA also provided a supplemental response by two letters, dated January 2, 1991, from Bathen to Greenberg, that transmitted a total of six cables. (OIC Exs. 79 and 80.) Bathen sent two letters on the same date because one enclosed five cables labeled "Classified" (OIC Ex. 79, with enclosures) and a separate letter transmitted a cable labeled "Top Secret--SCI" (OIC Ex. 80, with enclosure). None of the six cables is relevant to the issue of whether BNL-Rome had contemporaneous knowledge of the unlawful activities at BNL-Atlanta.

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D. The State Department Response - December 1990

The State Department responded to Greenberg's October 8 information request with a letter dated December 18, 1990. The letter asserted that the State Department had gathered a "number of possibly relevant documents." Over 100 intelligence reports were ultimately provided to the DOJ from the State Department.[28] Clark reviewed these State Department intelligence reports in Washington, although he did not remember precisely when; and the prosecutors transported the cables to Atlanta in April 1992 the cables for their review. (Clark Tr. 119.) Most of these cables did not relate to whether "BNL-Rome knew."

E. The NSA Response - December 1990

In response to Greenberg's October 8 requests, NSA conducted a broad search of the data-base most likely to contain information regarding BNL, and discovered a number of reports of intercepted communications it thought were responsive. At some point in December 1989, J. Lionel Kennedy, an attorney at NSA supervising this search, orally advised Clark or Greenberg that those reports were available for their review. On December 27,

[28]A State Department internal memorandum from "L." (the Legal Department) to "File," dated January 2, 1990, records that DOJ's Clark received from the State Department 32 cables that were referred by the CIA, 3 cables from State Department's own files, and 48 documents retrieved by Frank Machak of FAIM. Such documents were transmitted to Clark from the State Department with a cover memorandum, also dated January 2, 1990. According to all available documents and testimony, the dates in both memoranda appear to be inaccurate (i.e., 1990 instead of 1991). A possible explanation may be that the author of the memoranda at the State Department, writing just after the new year (January 2), inadvertently used the previous year in dating the memoranda.

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Clark and Greenberg visited NSA to review these reports and went through most of the material. Kennedy expected them to return the following week to continue their review, but never heard back from them. Kennedy was fairly sure that Clark and Greenberg did not complete their review of the NSA reports, and Greenberg confirmed that impression.[29] (Kennedy Tr. 7-26; Clark Tr. 121; Greenberg Tr. 179-185). There is no record that anyone at the DOJ ever went back to complete the review. (Kennedy Tr. 24-26.)

F. The NSC Response - November 1990

On November 29, 1990, Greenberg reviewed the NSC materials responsive to his requests which were related to "foreign policy" issues, such as loans to Iraq. They contained no information on the subject of whether BNL-Rome knew, or whether the intelligence agencies had contemporaneous knowledge of BNL-Atlanta's unauthorized loans. (OIC Ex. 202; Greenberg Tr. 167-173.) Clark did not recall reviewing any NSC documents (Clark Tr. 121.)

[29]FBI agents reviewed all these NSA reports again in connection with this investigation, and found nothing on the subject of BNL-Rome's contemporaneous knowledge of BNL-Atlanta activities. Similarly, they found nothing bearing on any knowledge of U.S. intelligence agencies of the BNL scandal or their involvement therein.

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VI. COMMUNICATIONS WITHIN THE DOJ REGARDING INTELLIGENCE INFORMATION -- OCTOBER - DECEMBER 1990

In June 1990, DOJ clearly took responsibility for coordinating all the requests made to the Intelligence Community regarding the BNL investigation and the gathering of responsive materials. However, there is some disagreement as to who had the ultimate responsibility for reviewing, analyzing, and following up on the information received.

Clark stated that he conducted an initial review of the intelligence information and did some follow-up, as described above.[30] He further stated that he probably told the USAO that, in his opinion, the intelligence information was mostly speculative or did not establish "contemporaneous knowledge" by BNL-Rome. However, Clark insists that he told the USAO that they had to look at the information for themselves, and that they should do their own analysis and follow-up. Clark denies that he ever reached any firm conclusions about this material. In Clark's view, the USAO had much greater familiarity with the facts, and could better determine what intelligence information was useful. (Clark Tr.

[30]Greenberg believed that very little follow-up was done on any of the intelligence information, even though such follow-up would have been routine. He assumed that Clark would conduct such follow-up "when appropriate," but certainly before the indictment. Greenberg did not believe he was responsible for these tasks, because he was becoming less and less involved in the BNL matter. (Greenberg Tr. 144-154.) Mueller noted, however, that prosecutors did not traditionally focus on leads from intelligence sources as being particularly productive, for a variety of reasons. (Mueller Tr. 36-38.)

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122-126, 127-130, 138-139, 152.)[31] I must note, however, that within DOJ, Clark was the most knowledgeable about the BNL matter.

By contrast, the USAO believed that Greenberg and Clark had assumed responsibility for reviewing this intelligence information. As Rukstele stated:

> Clark lived with this case for months. And he's a bright guy. And I have all the confidence in the world in him to look at a CIA document and say, this impacts on the indictment, or this doesn't impact on the indictment.

(Rukstele Tr. 53.) McKenzie, Rukstele and Wade each recall that Clark stated that he and Greenberg had reviewed responsive material from the intelligence agencies and determined that the information compiled would not affect or influence the proposed expanded indictment. (McKenzie Tr. 57-60; Wade Tr. 34-37; Rukstele Tr. 49-54.) Moreover, the USAO thought that its reliance on Greenberg and Clark was justified because both had greater experience in the Intelligence Community, the appropriate security clearances, familiarity with the facts and issues in the BNL case, and both had been given the assignment by Urgenson at the April 1990 meeting at DOJ's Command Center. (McKenzie Tr. 54-60; Rukstele Tr. 43-53.)

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[31] Clark's version seems to be supported by a memorandum dated December 6, 1990 from Clark to McKenzie that discussed Clark's work on the indictment and advised that "some of the CIA materials are here and can be reviewed by you at any time." (OIC Ex. 29.) Clark's memorandum also stated that additional CIA, State Department and DIA responses were expected. Clark also informed Urgenson in a memorandum, dated December 7, 1990, that BNL-related materials from CIA, DIA, State Department, and NSA would be available for the USAO's inspection at DOJ within two weeks. (OIC Ex. 27.)

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Letters and memoranda from McKenzie to DOJ in the Fall of 1990 appear to support the USAO's view that DOJ had the responsibility for handling Intelligence Community issues. McKenzie wrote a memorandum to Greenberg, dated October 9, 1990 (OIC Ex. 91), and a letter dated October 15, 1990, to Urgenson (OIC Ex. 21) seeking general intelligence information (not specifically focused on BNL-Rome's knowledge), that she believed "could impact the final scheme draft [of the indictment]."[32] (OIC Ex. 21.) McKenzie wrote Urgenson again on December 10, 1990, repeating the requests for information on U.S. government involvement in the BNL-Atlanta activities. (OIC Ex. 28.) Among other things, McKenzie's letter sought a written response to inquiries concerning:

> (a) Whether the unauthorized BNL-Atlanta funding was orchestrated, approved or directed by any facet of the U.S. intelligence or counter Intelligence Community prior to August 4, 1989; (and)
>
> (b) Whether any facet of the U.S. Intelligence Community had any knowledge of illegal activities at BNL-Atlanta prior to August 4,

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[32]McKenzie and Rukstele also submitted a status report to Mueller, dated October 1, 1990, to supplement the April 1990 prosecution memorandum. The status report again raised the question about the knowledge of the U.S. Intelligence Community, but it is unclear to whom the issues were assigned:

> Unanswered questions exist about the size, sophistication and activities of the Iraqi procurement network discovered during the investigation. Concern centers on what knowledge, if any, the U.S. intelligence and counter-intelligence agencies possessed and any assistance provided to the Iraqi network by the U.S.

(OIC Ex. 16, p. 14)

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1989, and if so, what did they know and when did they know it.[33]

(OIC Ex. 28, p. 1.)

Similarly, a January 28, 1991 memorandum from Clark to Taylor reflects that Clark was directly involved in the drafting of a new prosecution memorandum, even to the point of directing the precise language to be put into that memorandum concerning intelligence information received by DOJ. The January 28 memorandum thus shows that Clark was more involved in the overall BNL matter than he now recalls. (OIC Ex. 303; Clark Tr. 138.)

In any event, it does not appear that anyone from the USAO Task Force reviewed any of the intelligence information prior to the indictment being returned on February 28, 1991. (McKenzie Tr. 67-69.) Thus, at that point, the USAO must have been relying upon the review by DOJ, regardless of whether that reliance was justified or whether further review was necessary. Clark did not believe that any of the intelligence information that he reviewed "indicated with any degree of certainty that BNL-Rome or BNL management outside of Atlanta was culpable and aware." (Clark Tr. 126-127; Greenberg Tr. 199.) Clark also believed that the Task

[33]McKenzie also wrote a letter, dated October 19, 1990, to Wendy Blank in the Office of International Affairs, DOJ, and sought access to documents seized by the British in the case against Matrix-Churchill, TDG, TMG and certain individuals. (OIC Ex. 305.)

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force already resolved the possible leads raised in the cables.[34] (Clark Tr. 90-94; 100-106.)

VII. FURTHER DEBATE ON WHETHER BNL-ROME KNEW -- OCTOBER 1990 - FEBRUARY 1991

Even though the USAO continued to advocate in its October 1990 prosecution memorandum that BNL-Rome was a victim of the BNL-Atlanta scheme, DOJ was still not convinced.[35] A November 13, 1990 memorandum to Urgenson from Clark recounted a meeting he had in New York with officials at the Federal Reserve regarding BNL. (OIC Ex. 23.) In the memorandum, Clark described a number of documents containing information that suggested "BNL-Rome knew," and raising leads that he had not been aware of and that had not (to his knowledge) been pursued in Atlanta.[36] (Clark Tr. 115-117.)

The November 13 Clark memorandum resulted in a six-page letter from Urgenson to Rukstele, dated November 15, 1990, which raised a series of questions as to the involvement of BNL management outside Atlanta, and asked what steps had been taken to follow up various leads. (OIC Ex. 24.) The Clark memorandum also

[34]Given Clark's strong feelings, even up to the eve of the Indictment's return, it would appear that had intelligence information supported his view, he would have disclosed this supportive evidence to the USAO and the DOJ.

[35]In an October 1, 1990 status report to Mueller, Rukstele said that "final approval of the proposed indictment must be secured from . . . Department of State and National Security Council." (OIC Ex. 16.) Mueller disagreed with this statement, saying neither agency had the right to approve this Indictment. (Mueller Tr. 20-21.)

[36]On December 1, Clark raised this question again in a rough draft memorandum to Urgenson concerning the latest draft indictment proposed by the Atlanta USAO. (OIC Ex. 304.)

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prompted Urgenson to write a memorandum to Mueller, dated Nov 30, 1990, stating that:

> In brief, our review continues to raise significant questions concerning the completeness of the U.S. Attorney's investigation on the central issue of whether Banca Nazionale del Lavoro (BNL) was an unwitting victim of a scheme to defraud. I am sending . . . Clark and . . . Taylor to Atlanta next Monday to review all memoranda of interviews and the documentary evidence the U.S. Attorney intends to use in its case chief as well as to develop a list of witnesses (U.S. and Italian) who should be called before a grand jury.

(OIC Ex. 26.)

On January 11, 1991, members of the USAO and Task Force (Ruckstele, McKenzie, AUSA Kent Alexander, Brill, and Agent Wade) met with attorneys from DOJ (Urgenson, Clark and Taylor) to discuss the status of the case. An outline of the agenda for that meeting shows that the USAO made presentations on several issues in this case, including a discussion by AUSA Alexander on the "importance of indicting the case as a scheme to defraud." Two of the points on the outline for this topic were:

> 7. Congressional scrutiny and likely charges of a cover-up.
> 8. Media scrutiny and likely charges of a cover-up.

(OIC Ex. 301.) Next to these points is handwriting that appears to say "State-Italian protest."

At the January 11 meeting, it was agreed that, among other things, the USAO would [redacted] Clark and Taylor spent a week in

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Atlanta between January 25 and January 31 helping the USAO prosecutors complete these tasks.[37] (Clark Tr. 141.)

Following [redacted] and review of documents, the DOJ finally accepted the view that neither BNL-Rome nor its employees should be indicted. On February 1, 1991, Urgenson wrote a memorandum to Mueller stating that, after this work, he concurred with the USAO's recommendation that BNL-Rome be treated as a victim. (OIC Ex. 32; Urgenson Tr. 145-146; Clark 149-151.) While Clark concurred in that recommendation, he still had doubts, and wrote a memorandum to the file that same day raising questions as to whether BNL-Rome knew or should have known of the BNL-Atlanta scheme, particularly in light of an article dated February 20, 1988 in the Middle East Economic Digest ("MEED"). (OIC Ex. 33.) (Two days later, Drogoul and Von Wedel executed the first of the four MTLs with the Iraqis.) The MEED article stated, among other things, that BNL-Atlanta had committed to financing many hundreds of millions of Commodity Credit Corporation loans to Iraq, and that BNL was highly exposed to Iraqi risk. (OIC Ex. 203; Clark Tr. 145-150.)

Greenberg stated that the DOJ attorneys retained concerns about the case that were never completely satisfied. In his view, the interviews of the Italians never fully resolved some basic issues, and certain avenues of inquiry were not "pushed."

[37] On or about January 15, 1991, Rukstele announced that, effective February 15, 1992, he would become First Assistant U.S. Attorney in Las Vegas, NV, where he was before Atlanta, and thereafter, he would no longer actively be involved in the BNL case. (Rukstele Tr. 60-62.)

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(Greenberg Tr. 202-203.) However, Greenberg pointed out that he was not closely involved in the case at that point. (Greenberg Tr. 203-204.)

Whether or not the USAO or DOJ attorneys harbored private doubts about BNL-Rome's ignorance of BNL-Atlanta's activities, all agreed that there was insufficient evidence at that time to warrant an indictment against BNL-Rome. Clark did not believe that any of the intelligence information was "probative" on this issue. (Clark Tr. 152, 126-127.) He stated that the USAO could have been more diligent in reviewing the available intelligence information; however, he did not think that a more diligent review would have resulted in a different conclusion. He also said that he did not believe that the USAO deliberately ignored this information. (Clark Tr. 152-153, 166.)

As a result of this work, the final Indictment treated BNL-Rome as a "victim" of a scheme to defraud by Drogoul and others at BNL Atlanta.[38]

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[38]The indictment did not charge the Central Bank of Iraq ("CBI"), even though it had been named as a potential defendant. Mueller testified that the decision not to indict CBI was based on foreign policy considerations raised by the State Department and the Treasury Department. (Mueller Tr. 24-26.) A February 8, 1991 memorandum from Nicholas Rostow, Esq. to Brent Scowcroft at the National Security Council on the BNL indictment stated:

> I have informed Robert Mueller . . . of your reluctance to seek an indictment of Iraqi government officials whom we are unlikely to take into custody. Bill Barr may call you to discuss this matter. . .. In the event Barr calls you about this matter, I recommend that, as part of the defense of your policy preference not to go forward, you carefully question him with respect to the [DOJ's]

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VIII. ADDITIONAL INTER-AGENCY INFORMATION REQUESTS -- FEBRUARY 1991

In February 1991, the DOJ renewed its requests to the CIA for name traces and information on certain individuals and corporate entities in anticipation of the BNL indictment about to be returned by a Grand Jury in Atlanta. In a letter dated February 9, 1991, Richard of DOJ wrote Jameson and requested updated information on all the entities previously named in the Greenberg letters as well as two new entities, Central Bank of Iraq and Rafidain Bank. Two days later, Richard orally requested Jameson to initiate a search on the Iraqi Ministry of Industry and Military Production and an updated search on Wafai Dajani.

The CIA responded with a letter, dated February 12, 1991, from Jameson to Richard. (OIC Ex. 306.) The letter, consistent with previous responses, stated that "[n]one of the [CIA] searches have located any record of either a current or past relationship between this agency and any of [the] individuals or entities" named in Richard's letter. The letter concluded by noting that "we have been asked to respond to Congress about the BNL matter and would appreciate any thoughts on how to respond."

The CIA provided an additional response to Richard's February 9 request in a letter, dated March 5, 1991, from [redacted] Assistant General Counsel, CIA ([redacted]) to Clark at DOJ.

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reasoning for wanting to proceed. . ..

(OIC Ex. 117.) Attorney General Barr said that he had no recollection of talking with anyone on this issue, and Rostow recalled no further discussion on this. (Barr Tr. 19-21; Rostow Tr. 38-41.)

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(OIC Ex. 35.) The [redacted] letter, with attachments, conveyed additional information from the updated CIA searches in the form of: (i) newspaper and television reports on [redacted] (ii) 10 new intelligence reports on the named individuals and entities; and (iii) classified documents, originated by NSA and the State Department, which were referred to those agencies. [redacted]

On or about February 22, 1991, the DOJ and the FBI received the CIA cable (listed supra, on p. 17, subpara. 10), reporting that [redacted] There is no evidence the Fraud Section of the Criminal Division or the USAO Task Force ever saw this cable. (OIC Ex. 313.) [redacted]

II. DOJ'S RECEIPT OF THE 6 NOVEMBER 1989 TYPESCRIPT -- MARCH 1991

On March 11, 1991, [redacted] wrote another letter to Clark, referring to a recent meeting attended by [redacted] Clark and Greenberg, and enclosing a copy of the 6 November Typescript by the CIA's Directorate of Intelligence that had never been provided to the DOJ (OIC Ex. 53.) Clark did not believe that the typescript

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was at all significant on the issue of whether "BNL-Rome knew," because it was based only on press reports.

[redacted] letter explained that the 6 November Typescript was not produced in previous trace searches because "the office that produced it inadvertently failed to reference it in the indices maintained by the Directorate of Intelligence."[39] CIA Analyst [redacted] did not understand this, saying that a copy of the typescript would have been kept in her personal file and her Division's file, and could have been easily retrieved. (Clark Tr. 83-84, 154; [redacted] Tr. 23-27.)

The 6 November Typescript had been the subject of the January 31, 1990 transmittal letter from [redacted] of the CIA to David Kunkel at Department of Agriculture but that letter was not provided to the DOJ until October 1992. The January 31 letter stated that "new information" had come to light that "managers at BNL headquarters in Rome were involved in the scandal." [redacted] had also drafted this letter for [redacted] signature. She was unsure whether her sources at the time were public or private, but when she was later asked to declassify this letter, she found a

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[39]Members of the USAO Task Force saw the 6 November Typescript in Washington on two occasions. First, Wade of the Department of Agriculture and Richard Horton of Customs saw it during a September 13, 1991 trip to Washington. McKenzie, Chartash and Wade subsquently saw it when they traveled to Washington and viewed classified materials. (McKenzie Tr. 70-72; Chartash Tr. 60-61.)

The 6 November Typescript was ultimately sent to Atlanta by DOJ on July 9, 1992, in response to McKenzie's request for a copy of a report that had been cited in a recent Los Angeles Times article. When DOJ forwarded the 6 November Typescript, McKenzie and others in Atlanta realized that the newspaper article had cited a report that they had already seen. (McKenzie Tr. 71-72.)

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London Financial Times article that supported this statement, and was able to declassify the letter on the grounds that a public source existed. [redacted] Tr. 31-33.) She disagreed with the August 14, 1992 letter from Elizabeth R. Rindskopf, General Counsel to the CIA, to Allen Charles Raul, General Counsel to the Department of Agriculture, which suggested that the 31 January letter was based only on press reports. (OIC Ex. 223, p. 3; [redacted] Tr. 52-53.)

X. THE GONZALEZ SUMMARY -- OCTOBER 1991

In October 1991, the House of Representatives' Committee on Banking, Finance and Urban Affairs, chaired by Representative Henry Gonzalez ("the Gonzalez Committee") asked the CIA to produce certain BNL-related cables that the State Department had identified by serial number, and referred to the CIA under the "third agency rule." The CIA declined to produce any "raw" classified intelligence information to a "non-oversight" committee in Congress (such as the Gonzalez Committee), but it agreed to prepare a summary of that information as a compromise ("the Summary"). It also added two "Analytical Comments" at the end to "round out" the CIA Summary.

The [redacted] section of the CIA's Directorate of Operations prepared the CIA Summary based solely on the cables that had gone to the State Department, and then passed it along to the Directorate of Intelligence for analytical comments. [redacted] recalled

40. [redacted]

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knowing the Summary and analytical comments would be reviewed by a Congressional Committee which prompted her to spend approximately two hours reviewing it (and possibly the cables), and preparing the comments. Her "Analytical Comment B" stated that two of the cables, dated October 20, 1989 and February 21, 1991, "confirmed press allegations that more senior BNL officials in Rome were witting of BNL-Atlanta's activities." [redacted] does not recall reviewing any other BNL information before preparing the comments, although she had some background on BNL, discussed above, that may have influenced her thinking.[41] ([redacted] Tr. 54-60.) [redacted]

At her interview, [redacted] insisted that the Summary and the underlying cables support her analysis. She recognized, however, that the verb "confirmed" could be misinterpreted to mean that there was "evidence" that BNL-Rome knew, when she meant to suggest that the cables in the Summary constituted additional, firmer information that appeared to corroborate press reports. Similarly, [redacted] stated that she did not mean to suggest that the cables showed that BNL-Rome was "witting" of any illegal activities at BNL-Atlanta. The word "activities" could refer to either lawful or unlawful activities, and the cables were ambiguous on that subject. ([redacted] Tr. 60-75.)

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[41] [redacted] did not recall whether she reviewed the 6 November Typescript or the 31 January 1990 letter during the preparation of Analytical Comment B.

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After [redacted] finished her comments, the Summary with the analytical comments was distributed to several people at the CIA,[42] but it was not distributed to the DOJ or the FBI. The Summary was reviewed by Dennis Kane, of the Gonzalez Committee, in October 1991. Kane was allowed to take notes on the Summary and these notes apparently became the basis for the Gonzalez press release almost a year later, on September 14, 1992. (Clark Tr. 97; [redacted] Tr. 55.)

XI. ADDITIONAL INTER-AGENCY REQUESTS -- JUNE 1991 - FEBRUARY 1992

The USAO continued to make periodic requests for intelligence information, but none related to BNL-Rome's knowledge or the knowledge or participation of U.S. government agencies. For example, a letter dated June 7, 1991 from Alexander of the USAO to [redacted] of the CIA submitted four additional names for trace searches.[43] In addition, Clark sent a facsimile transmittal, dated February 21, 1992, to [redacted] at the CIA. The transmittal from Clark states that he is transmitting "3 TD's" that had been released to the CIA during 1990 and 1991 and that Clark would

[42]One of the people on the routing slip was [redacted] of the CIA's Office of General Counsel, although [redacted] does not recall seeing the Summary at that time. ([redacted] Tr. 112-113.) Almost a year later, [redacted] wrote the September 4, 1992 CIA letter, for Holmes's signature, that contained responses that could be read to be inconsistent with [redacted] Analytical Comment B.

[43]Of the four names submitted, just one was related to BNL. The other three names were submitted in connection with a separate, non-BNL matter that Alexander was handling.

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contact [redacted] to discuss whether "review of the TD's would affect the BNL case." (OIC Ex. 225.)

XII. INSPECTION OF INTELLIGENCE INFORMATION BY THE USAO TASK FORCE TEAM -- APRIL 1991 - APRIL 1992

The USAO and its Task Force reviewed the intelligence information received by DOJ on at least three occasions after the Indictment was returned on February 28, 1991. Clark testified that the USAO and its Task Force members thoroughly reviewed the information on several occasions at DOJ, and that nothing was withheld from them. (Clark Tr. 130.) McKenzie felt that the USAO and its Task Force had an "open invitation" to review the intelligence information, but she felt a visit was not mandatory or urgent because Clark had told them the materials would not affect the Indictment. Wade recalls that he reviewed some State Department cables in December 1990 or January 1991, and that he and Richard Horton (of Customs) reviewed CIA, DIA, and State Department reports at DOJ on September 13, 1991. (Wade Tr. 41-46; 55-68.) Further, on April 30, 1992, the USAO's McKenzie and Randy Chartash ("Chartash") along with Wade reviewed four to five folders of the classified documents at DOJ (including CIA, DIA, and State Department reports that Wade and Horton had previously seen).[44] After their April 1992 review, they were permitted to take the

[44] An index of all the intelligence reports, which was prepared by Nancy Brinkac, a trial attorney at DOJ working with Clark, confirms that on April 30, 1992, all the attorneys working on this case had the opportunity to review all of the cables that the DOJ had obtained from the Intelligence Community. (OIC Ex. 226; Clark Tr. 74-79, 153.)

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State Department classified documents (over 100 intelligence reports) back to Atlanta. The CIA, however, declined to permit their own intelligence information to be removed from the DOJ building.

XII. THE DROGOUL PLEA HEARING AND DEBRIEFINGS -- JUNE - AUGUST 1992

On June 2, 1992, Drogoul pleaded guilty to 60 counts of the 347 - count Indictment and agreed to cooperate fully with the Government. At the plea hearing, Judge Shoob questioned why the USAO was permitting Drogoul to plead guilty to only 60 counts, when he had shortly before indicated that he would plead guilty to the entire Indictment and make a full statement to the Court. Judge Shoob, in accepting Drogoul's guilty plea, suggested that Drogoul was being "silenced," and warned that he would get no downward departure from the sentencing guidelines if he did not tell the full story at his sentencing hearing.[45]

Thereafter, the USAO debriefed Drogoul on 33 occasions. During these debriefings, Drogoul identified five individuals involved in the BNL scandal that he believed might have some connection with U.S. intelligence agencies. He was also asked repeatedly whether "BNL-Rome knew." Drogoul offered no solid evidence of BNL-Rome's knowledge, other than saying that he believed officials at BNL-Rome were aware of the unauthorized

[45]A detailed analysis of the Rule 11 hearing and other issues raised by the Court is contained in Part I of this Report. Accordingly, this Part II of the Report will consider only those issues raised by the Court that relate to Intelligence Community information.

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loans, based on their knowing glances, winks and nods, and because they "must have been aware" from the size of the transactions and other "signals."

In August 1992 defense attorney Bobby Lee Cook began representing Drogoul, and Drogoul subsequently refused to cooperate further with the USAO.

XIV. CONGRESSIONAL COMMITTEE REQUESTS -- JUNE 1992

By letter dated June 3, 1992, Senators David L. Boren and Frank H. Murkowski, on behalf of the Senate Select Committee on Intelligence ("Senate Intelligence Committee"), wrote Robert M. Gates, Director of the CIA, and requested an "all-source chronology which recounts all Intelligence Community reporting on all branches of (BNL), with particular emphasis on that bank's relations with Iraq" or with any third party that engaged in arms transfers or defense cooperation with Iraq." The CIA prepared such a chronology.[46]

On July 24, 1992, Director Gates notified Representative Gonzalez that nearly all of the 6 November Typescript (annexed as OIC Ex. 14) had been declassified and provided to him. The report, in declassified form, was then reprinted in the July 31 Congressional Record at pp. H7142-7144. As a result, Alan Charles Raul, General Counsel, Department of Agriculture, wrote an

[46] A copy of the June 3 Boren letter and an abbreviated two-page chronology were faxed to Ellen R. Meltzer, Senior Litigation Counsel, DOJ, on September 2, 1992. (OIC Ex. 302.) It is unclear whether anyone at DOJ was previously aware of the Senate Intelligence Committee request or of the CIA's chronology.

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August 7, 1992 letter to Rindskopf, CIA General Counsel, requesting that the transmittal letter accompanying the report (i.e., the [redacted] letter to Kunkel, dated January 31, 1990), be declassified as well. (OIC Ex. 223.) According to Raul's letter, the [redacted] transmittal letter provided "certain additional information regarding the BNL-Iraq situation that is not reflected in the November 6 memorandum . . . (that) is highly relevant to the current inquiries into the BNL-Iraq matter." Rindskopf responded with the letter to Raul, dated August 14, 1992, that is referred to above, which enclosed a declassified version of the cover letter and noting that the "additional information" referred to by Raul "has been sourced to various newspaper reports." (OIC Ex. 223, p. 3.)

XV. INTER-AGENCY COMMUNICATIONS REGARDING DIVERSION/BARTERING ALLEGATIONS -- JUNE 1992 - AUGUST 1992

During the Summer of 1992, the USAO asked DOJ to request information from the Intelligence Community on the issue of whether Iraq was diverting agricultural products purchased through the Commodity Credit Corporation guarantees to Soviet block countries, and bartering them for military equipment.[47] Although these

[47]In a letter dated July 31, 1992, DOJ's Clark wrote Jameson at the CIA concerning the diversion and sought, among other things, copies of all reports provided to Congressional Committees, including a report prepared at the specific request of the Senate Intelligence Committee regarding the Intelligence Community's knowledge of BNL and the Iraqi procurement network (i.e., the "all-source chronology" prepared by the CIA for the Senate Intelligence Committee). According to Brinkac, the CIA immediately made available to the DOJ for its review at the CIA all such reports, and Meltzer reviewed the all-source chronology.

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requests were broad enough to pick up additional information on the issue of whether BNL-Rome or the Intelligence Community knew of, or participated in, the BNL-Atlanta unauthorized loans, they do not appear to have done so, despite full searches and review of documents.[48]

XVI. THE MEETING AT DOJ ON AUGUST 31, 1992

On August 31, 1992, Brill met with Mueller and Ira Raphaelson in connection with the Drogoul sentencing hearing that was scheduled to begin on September 14. They discussed, among other things, the need to follow up on "every lead" from the Intelligence Community questions raised by Drogoul when he identified five people with possible intelligence agency connections.[49] (OIC Ex. 56.) They also discussed the USAO's need for help from DOJ in drafting the Sentencing Memorandum, which was behind schedule. (Brill Tr. 70-87; Mueller Tr. 48-57.)

To help with these tasks, Mueller assigned Ellen R. Meltzer, Senior Litigation Counsel, Criminal Division, Fraud Section ("Meltzer"), who had been handling the DOJ's response to an August 11, 1992 subpoena from Representative Gonzalez's Committee, and who was somewhat familiar with the case. Mueller thought that

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[48]Although my investigation discovered documents showing that U.S. intelligence agencies were gathering information prior to August 1989 on the Iraqi procurement of military equipment financed at least in part by the BNL-Atlanta loans, these issues are not the focus of this Report.

[49]A New York Times column published that day alleged contemporaneous knowledge by the CIA of the illegal activities of BNL-Atlanta.

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Meltzer's writing skills would be particularly useful to the USAO, and that her participation would avoid the personality conflict that had developed between Clark and McKenzie. (Brill Tr. 19-80; Mueller Tr. 92-93.) Mueller, Brill and Meltzer may also have discussed sending letters to all the intelligence agencies at that point, but neither Mueller nor Brill has any specific recollection of the substance of that discussion. (Mueller Tr. 62, 64, 86-87.)

XVII. SUMMARY OF SIGNIFICANT EVENTS RELATED TO DISSEMINATION OF INTELLIGENCE INFORMATION

A summary of the foregoing significant events in connection with the requests by the USAO and DOJ for intelligence information, the responses by the Intelligence Community, and the dissemination and review of such information is set forth below in order to set the context for the events of September 1992.

August 4, 1989: The BNL scandal becomes public knowledge as the search warrant is executed at the offices of BNL-Atlanta.

December 7, 1989: AUSA McKenzie writes a letter to DOJ's Warlow in the Office of International Affairs listing four Iraqi nationals, then targeted in the proposed indictment, for dissemination to the Intelligence Community.

January 31, 1990: CIA's [redacted] sends 6 November Typescript to USDA's Kunkel.

January -- May 2 1990: DOJ and USAO participate in a series of meetings where, among other matters, the issue of whether "BNL-Rome knew" is debated.

July 3, 1990: AUSA Rukstele writes a letter to DOJ's Richard seeking intelligence information on whether the CIA had knowledge or played a role in BNL's dealings with foreign governments and, specifically, Iraq.

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August 3, 1990: DOJ's Greenberg writes memorandum to CIA's [redacted] requesting an "all component search" for CIA information on BNL (this is the first formal request by DOJ of an Intelligence Community agency).

August 24, 1990: CIA's Jameson writes Greenberg a letter with the CIA's "interim response," stating that information had been collected as to certain of the names Greenberg provided.

October 2, 1990: Jameson writes Greenberg a letter, annexes classified exhibits and refers Greenberg to classified documents at other intelligence agencies.

October 8, 1990: Greenberg writes letters to CIA, DIA, NSC and the State Department requesting information on 31 individuals and BNL funding practices.

October 15, 1990: McKenzie writes Urgenson a letter seeking general intelligence information that could impact "the final scheme draft" of the Indictment.

November 21, 1990: DIA's Bathen writes Greenberg a letter with three enclosures, including [redacted]

November 29, 1990: Greenberg reviews NSC materials, compiled in response to DOJ's request, that contain no information on whether "BNL-Rome knew."

December 18, 1990: Jameson writes a third response letter to Greenberg, annexing classified information.

December 18, 1990: State Department writes a letter to Greenberg stating that it has gathered relevant documents in response to Greenberg's request.

December 1990: NSA's Lionel Kennedy advises DOJ (Clark or Greenberg) that NSA had a number of reports available for their review.

December 6, 1990: Clark writes a memorandum to McKenzie stating that CIA materials could be reviewed by her at DOJ at any time.

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December 27, 1990: Clark and Greenberg review documents at NSA.

December 1990 -- January 1991: Clark advises USAO that the Intelligence Community information gathered at DOJ to date will not affect the Indictment.

December 1990 -- January 1991: USDA's Wade, a member of Task Force, reviews classified State Department cables at DOJ.

January 1991: [redacted]

February 9, 1991: Richard writes Jameson a letter requesting updated CIA trace searches and information on certain individuals and corporate entitites.

February 11, 1991: Richard orally requests that Jameson initiate CIA searches on the Iraqi Ministry of Industry and Military Procurement and Wafai Dajani.

February 12, 1991: Jameson writes Richard stating that the CIA had no relationships with the entities and individuals named in Richard's recent letter.

February 22, 1991: DOJ and FBI receive a CIA cable in normal course dissemination [redacted]

February 28, 1991: Indictment is returned.

March 5, 1991: CIA's [redacted] writes Clark with supplemental response and classified attachments.

March 11, 1991: [redacted] writes Clark and encloses copy of the 6 November Typescript.

September 13, 1991: Task Force members Wade and Horton review CIA, DIA and State Department documents at DOJ.

October 1991: CIA's [redacted] prepares analytical commentary to [redacted] Summary of cables for review by staff member of House Banking Committee.

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April 1992: DOJ's Brinkac and a paralegal prepare index of all cables in files at DOJ.

April 30, 1992: Wade and AUSA's Chartash and McKenzie review CIA, DIA and State Department documents at DOJ and transport State Department materials to Atlanta.

September 1, 1992: DOJ's Meltzer drafts letters to CIA, DIA and NSA seeking name traces and responses to questions.

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I. THE SEPTEMBER 1, 1992 LETTERS TO THE INTELLIGENCE COMMUNITY

On September 1, 1992, Meltzer drafted letters to the CIA, addressed to David Holmes (OIC Ex. 47), to the DIA, addressed to Robert H. Berry, Jr. (OIC Ex. 86), and to the NSA, addressed to Stewart A. Baker (OIC Ex. 46.) The letters were virtually identical, listing ten questions concerning whether the intelligence agencies and BNL-Rome had contemporaneous knowledge of BNL-Atlanta's unauthorized loans.[50]

In particular, Question 8 of each letter asked:

> Does the [agency] have any information that BNL-Rome was aware of the illegal activities engaged in by BNL-Atlanta? If so, where did the [agency] acquire such knowledge?

This question was added by Brinkac, after she was asked to review Meltzer's letter. Brinkac thought it was an important question because of allegations that had been made in the press about BNL-Rome's knowledge.[51] (Brinkac Tr. 34-44.)

Since Mueller and Urgenson were both unavailable,[52] the letters were briefly reviewed only by Dennis Saylor (Special Counsel and Chief of Staff to Mueller) and Brinkac before being

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[50] The versions to CIA and DIA also named the five purported "sources" referred to by Drogoul, and asked whether the agencies had information on any of the names.

[51] Brinkac later advised that the word "illegal" in Question 8 was probably chosen by someone else. (Brinkac Tr. Vol. 2, 6-7.)

[52] Urgenson was preparing for the BCCI trial, then scheduled for mid-October 1992. (Urgenson Tr. 181-182.)

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signed by Gerald E. McDowell, Acting Deputy Assistant Attorney General and Meltzer's Fraud Section Chief, who had little familiarity with the BNL case at the time. (Urgenson Tr. 182-82.) Saylor and the USAO representatives do not remember drafting or making any substantive comments on the September 1 letter. (Saylor Tr. 26-28; Brill Tr. 87-89; McKenzie Tr. 105.)

Before sending out the letters, Meltzer telephoned [redacted] at the CIA and Berry at the DIA, and Brinkac called Kennedy at the NSA. The purpose of these calls was to advise that the letters were being sent in anticipation of intelligence information issues being raised during the Drogoul sentencing hearing.[53] Meltzer then faxed two copies of the letter to the CIA for Holmes and [redacted] and a copy to Berry and Kennedy at DIA and NSA, respectively. The letters called for a response by September 4. (Berry Tr. 48.)

After sending out the information requests to the CIA, DIA and NSA, Meltzer wrote a short note to Mueller describing her actions and enclosing copies of the letters. (OIC Exs. 57, 58; Brinkac Tr. 44; Kennedy Tr. 38-39.)

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[53]Meltzer faxed the five names referred to by Drogoul to [redacted] on August 31. [redacted] states that he had heard the five names before from McKenzie, who had made informal requests to [redacted] for CIA traces during the course of her involvement with the BNL investigation. [redacted] always responded to McKenzie's requests informally, but would notify Nancy Brinkac at DOJ and write a summary memorandum of the trace.

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II. MELTZER VIEWS THE CIA'S ALL-SOURCE CHRONOLOGY -- SEPTEMBER 3

On September 3, a CIA representative showed Meltzer the all-source chronology that the CIA had prepared for the Senate Intelligence Committee earlier in the summer. This chronology was not shown to DOJ until Meltzer heard about it from [redacted] and specifically asked to see a copy of it.

Meltzer was permitted only to review this chronology and take notes, but not make a copy.[54] The chronology summarized events and intelligence information related to BNL dated from 1984, including the following cables on the subject of whether "BNL-Rome knew":[55]

1. 12 September 1989 CIA operational cable [redacted]
2. 12 September 1989 DIA [collusion];
3. 5 October 1989 CIA intelligence cable [redacted]
4. 20 October 1989 CIA intelligence cable [redacted]
5. 17 November 1989 CIA intelligence cable [redacted]
6. 12 January 1990 CIA intelligence cable [redacted]
7. 20 April 1990 CIA intelligence cable [redacted]

[54]Meltzer's notes of this chronology were later typed and put in her files.

[55]All of these cables have previously been described in detail.

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The CIA representative was unable to answer Meltzer's questions about the cables, and it is unclear how thoroughly Meltzer reviewed the all-source chronology. Certainly, her notes of the chronology do not reflect all the information in the cables set forth above. Moreover, the chronology did not refer to the CIA's October 1991 Summary prepared for Representative Gonzalez; it did not include a summary of paragraph 4 of the 12 January 1990 intelligence cable [redacted] and it did not refer to the 22 February 1991 cable suggesting [redacted]

III. THE RESPONSES TO THE SEPTEMBER 1 LETTERS -- SEPTEMBER 4 AND 8

On September 4, 1992, Meltzer received letters from the CIA and DIA responding to the DOJ's September 1 requests. (OIC Exs. 48 and 98, respectively.) The CIA letter responded to Question 8 specifically as follows:

> CIA has publicly available information, acquired in the December, 1989 - January, 1990 time-frame, that BNL-Rome was aware of the illegal activities engaged in by BNL-Atlanta.

(OIC Ex. 48, p. 2).

The DIA responded generally to all DOJ's requests with the statement:

> Our file search with regard to the ten questions posed by Mr. McDowell's letter has been negative. DIA has had no involvement whatsoever with BNL.

(OIC Ex. 88.)

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On September 8, 1992, Brinkac received the NSA's response to the DOJ's September 1 letter. (OIC Ex. 46.) The NSA letter responded to Question 8 specifically with the word "No", but noted that the agency's response was limited by the type of information collected. (OIC Ex. 230.)

When Meltzer saw the September 4 letter, she called Urgenson to discuss the CIA's response to Question 8. Urgenson had no independent recollection of that call, but an E-Mail from Meltzer to Brinkac, dated September 4, reflects part of that coversation:

> I spoke with Larry re: CIA's response to question 8. We (i.e., you) need to follow up with CIA and just make sure that what they are referring to is nothing more than press reports, etc. and what they specifically concerned.

(OIC Ex. 49.)[56]

Shortly thereafter, Meltzer left for Atlanta to assist in the preparation of the sentencing memorandum. [57] Although Brinkac recalled receiving the September 4 E-Mail from Meltzer, she had no recollection of following up with the CIA, or discussing this further with Meltzer. (Brinkac Tr. Vol. 2, 3-6.)

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[56]Urgenson surmised from this E-Mail that he briefly discussed the issue with Meltzer on the telephone as he prepared for the BCCI trial. (Urgenson Tr. 183-84, 187-88.)

[57]McKenzie reviewed the CIA's September 4 letters from the CIA and DIA shortly after Meltzer arrived in Atlanta, but the USAO did not have the appropriate clearance to review the NSA's September 8 response. Mueller, Urgenson, Brill and Chartash do not recall seeing any of these September letters until much later in the month. (Mueller Tr. 73; Urgenson Tr. 89-90.)

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Throughout early September, no DOJ or USAO attorney consulted with Clark or Greenberg in connection with the September 1 letters or the responses to those letters, even though they were probably in the best position to evaluate these letters and responses based on their prior work. (Clark Tr. 167-169, 176.)

A. The CIA's Preparation of Its Response -- September 4

Both [redacted] and Holmes, the Deputy General Counsel at the CIA, received a copy of the DOJ's September 1 letter. [redacted] had been involved in the BNL case since June 1991,[58] and Holmes was handling the matter for General Counsel Elizabeth Rindskopf while she was absent from the office. Holmes specifically assigned [redacted] (via Jameson) to handle the CIA's response to the September 1 letter, even though he stated that he was not entirely confident of [redacted] abilities, and thought he needed supervision. (Holmes Tr. 19-21, 23-25, 35-36.)

[redacted] said that he took a number of steps to respond to the DOJ's September 1 letter. First, he initiated a trace search of the five names submitted by Meltzer to be conducted by the Directorate of Operations Information Management Staff, [redacted]

[redacted]

[58] [redacted] had previously been assigned to respond to specific requests of Representative Gonzalez, made during the period of August through September 1991, for certain cables. In April 1992, in response to a subpoena from Representative Gonzalez's Committee, the Treasury Department located five CIA cables related to BNL that appeared responsive to the subpoena. [redacted] recalls that he received the cables from Treasury Department attorney Gerry DiGiulio and then reviewed the cables with Brinkac and Clark at DOJ.

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(Cooper Tr. 9-11, 79-82.) He also reviewed numerous records, and prepared proposed responses to the ten questions in the September 1 letter.[59] Finally, [redacted] reviewed his proposed responses with [redacted] Office of Congressional Affairs [redacted] and [redacted] in the Directorate of Intelligence Office of Near Eastern and South Asian Analysis. (Cooper Tr. 87-93.) [redacted]

According to [redacted] "[a]t no time did any of those individuals object to the answers" and "[t]hese were the people designated by their front offices to give a final say-so as to the

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[59]Specifically [redacted] allegedly reviewed the following information in connection with his response to Question 8:

1. Litigation files maintained in the CIA's Office of General Counsel;
2. Files maintained in the CIA's Office of Congressional Affairs;
3. The 6 November Typescript prepared by Directorate of Intelligence (OIC Ex. 14);
4. The [redacted] transmittal letter (enclosing the 6 November Typescript), which stated that BNL-Rome knew of BNL-Atlanta's activities (when questioned by [redacted] stated that his opinion was based on press reports during the December 1989 and January 1990 period) (OIC Ex. 110);
5. All cables then on file and the 16 or 17 Directorate of Intelligence reports in which BNL was mentioned; and
6. [redacted]

([redacted] Tr. 13-15, 87-96, 102-105.)

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responses."[60] ([redacted] Tr. 14-15, 88.) [redacted] further stated that [redacted] and [redacted] suggested that the words "publicly available information" be substituted for [redacted] phrase of "press reports" in [redacted] proposed response to Question 8, because the latter clause did not sound technical enough for an intelligence agency.[61] ([redacted] Tr. 103.)

[redacted] disagreed with [redacted] account. According to her, [redacted] called only once during this period to ask what sources she and [redacted] were aware of on the subject of whether BNL-Rome knew, That call was late on a Friday afternoon, probably on September 4. [redacted] told [redacted] that she was aware off-hand of press reports suggesting that BNL-Rome knew, but would have to check her file as to whether there was any non-public information.[62] However, [redacted] did not ask her to do such a review. [redacted] stated she never saw any draft of the September 4 letter, and made no comments on the wording of that letter, which she viewed as "incomplete." [redacted] Tr. 79-89.)

After [redacted] finished the CIA's September 4 letter, he gave a final draft to Holmes for his signature late on Friday afternoon, September 4. (Holmes Tr. 38.) Holmes had not been

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[60]All these people had been appointed by their respective CIA Directorates to the "Iraqi Task Force" to handle questions on BNL matters.

[61][redacted] noted that the DIA's September 17 response had similar wording, although DIA had no direct contact with [redacted]

[62][redacted] had kept a complete file on BNL since October 1989, and had written the 6 November Typescript and the January 31, 1990 letter for [redacted] signature, as well as the Analytical Comments in the October 1991 CIA Summary for Representative Gonzalez.

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supervising [redacted] work on this letter, and had not seen an earlier draft. However, he stated that before he signed the letter, he asked [redacted] whether the letter had been "coordinated" with other departments, and whether [redacted] was satisfied that the letter contained accurate and complete answers. (Holmes Tr. 39-40.) [redacted] assured him that it did, but gave no specifics. (Holmes Tr. 40-44.)

Holmes then skimmed the letter himself, and did not specifically recall noticing the response to Question No. 8 at that time. (Holmes Tr. 45.) Holmes did not recall asking whether Jameson had supervised [redacted] work, or had reviewed the answers in the letter, even though Holmes thought that [redacted] needed such supervision. (Holmes Tr. 39-40, 43-44.) Holmes also did not recall looking at the questions in the September 1 letter, and comparing them with the CIA's responses, before signing the letter. (Holmes Tr. 44.)

[redacted] stated that in responding to Question 8 he focused on the issue of what information, if any, the CIA had that would show that BNL-Rome had contemporaneous "institutional knowledge" of unlawful activities at BNL-Atlanta. [redacted] Tr. 14-16, 95-97.) In [redacted] view, unless a source specifically stated that BNL-Rome had contemporaneous knowledge, he could not assume that BNL-Rome had such knowledge.[43] Moreover, since none of the CIA cables

[43] [redacted] testified that he reviewed "speculation from sources that said they [BNL-Rome] must have known, how could they not have known, with no corroborating evidence. . ." as well as "information from a lot of sensitive sources. . . that said they did not know." ([redacted] Tr. 105.)

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specified a time-frame or stated whether the loans described therein were authorized or not, [redacted] concluded that he had no classified information that BNL-Rome knew. ([redacted] Tr. 16-18, 105, 108-109.)

While [redacted] acknowledged that, in retrospect, he could have expanded the response to Question 8 to discuss speculative information, he insisted that the CIA's September 4 letter was not misleading or inaccurate. ([redacted] Tr. 108-110.) [redacted] also noted that he thought the DOJ already had most, if not all, of the information on file at the CIA. A detailed renewed analysis of such information was neither requested nor realistic under the short time allotted for the CIA's response.[44]

Holmes testified that, in his view [redacted] simply missed some cables during his review. In particular, Holmes says that when Jameson later showed [redacted] the 12 January 1990 cable reporting [redacted] (OIC Ex. 59), and asked [redacted] how that cable could be consistent with the September 4 letter, [redacted] responded with "stony silence." (Holmes Tr. 104-105.) [redacted] disagreed with this testimony, saying that he specifically recalled reviewing the 12 January 1990 cable before drafting the September 4 CIA response and that he, unlike

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[44] [redacted] later told Holmes that Meltzer had said that she was only looking for new intelligence regarding BNL-Rome's contemporaneous knowledge, and was not interested in intelligence already provided to the DOJ. However, Holmes did not remember [redacted] telling him this when the September 4 letter was drafted, and neither the letter nor any other document reflects such a limitation. (Holmes Tr. 95, 99-103.)

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Jameson, realized that the DOJ had possessed the [redacted] since October 1990. [redacted] Tr. 94.) [redacted]

B. The NSA's Preparation of a Response -- September 8

Kennedy said that when he received the DOJ's September 1 letter, he discussed it with General Counsel Stewart Baker, Assistant General Counsel Vito Potenza, and several operations people. On September 9, 1992, the NSA sent the DOJ a letter that responded to Question 8 with the word "No." Kennedy believed that NSA's response in the negative to Question 8 was accurate, and reflected the NSA's best understanding of the available information reviewed. (Kennedy Tr. 38-43.)

C. The DIA's Preparation of a Response -- September 4

Berry initiated the search for the five names in the DOJ's September 1 letter, [redacted] (Berry Tr. 51.) [redacted]

He contacted the DIA's Office of the Controller for information on any dealings with BNL, and relied upon the results of the DIA's previous searches for BNL information undertaken in the fall of 1990 (OIC Ex. 73) and in the summer of 1992. (OIC Ex. 85; Berry Tr. 52.) In Berry's view, given the time constraints in

[65]When Berry received the September 1 letter, he was "surprised" that it contained ten questions in addition to the five names for the trace search that he and Meltzer had discussed. (Berry Tr. 52.)

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which a response was requested (i.e., by September 4), it would have been impossible to begin and complete a "zero based search."

Berry drafted and signed the letter without conferring with anyone else at DIA or at DOJ, mentioning to DIA's General Counsel William J. Allard only that he had completed the task. (Berry Tr. 52-54.) At the time, Berry's attention was more focused on the DIA's response to a subpoena from the Gonzalez Committee. Berry stated that the Director of the DIA had been subpoenaed and that Berry, in coordinating the response, was receiving documents "from everybody." (Berry Tr. 54-55.)

IV. THE SENTENCING MEMORANDUM AND BRILL'S LETTER TO COOK -- SEPTEMBER 10 AND 11

The USAO's September 11 Sentencing Memorandum stated on page 34 that "no credible evidence has been uncovered that supports the defendant's suspicion that other officers at BNL or public officials within the United States government knew of his illegal activities." (OIC Ex. 99, p.34.) Meltzer was responsible for drafting this language and it is unclear what information she relied on for this statement. McKenzie said that Meltzer reviewed this language with "Justice," without identifying any individual.[46] (McKenzie Tr. 114.) Clark said he was not consulted about this before the Sentencing Memorandum was filed with the Court. (Clark

[46]Chartash remembered that "many people had an opportunity to review" this language, but that he personally raised no questions or comments. He viewed Meltzer as being responsible for intelligence information issues. (Chartash Tr. 102-105.) Brill had no personal knowledge of the basis for this statement. (Brill Tr. 116.)

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Tr. 197.) There is no record that Meltzer or the USAO received the CIA cables before drafting this language.

At around this same time, McKenzie received a September 8, 1992 letter from Bobby Lee Cook, Drogoul's new attorney, requesting documents and information on a variety of subjects. (OIC Ex. 209.) Paragraph 2 of the Cook letter expressly requested documents or information "that would show knowledge on the part of the government in BNL-Atlanta's illegal dealings with the Iraqis." Although the Cook letter went on to refer to the "party line" that "no one in BNL-Rome or BNL-NY knew of the wrongdoing," it did not specifically request any information on this subject.

Brill consulted with Clark about Cook's request in paragraph 2, because she viewed him as being the most knowledgeable person on intelligence information issues. (Brill Tr. 94.) Based on Clark's suggested language, Brill drafted a response to Cook's letter that included a statement that the "government is aware of no document or physical evidence that would show [contemporaneous] knowledge on the part of the government of BNL-Atlanta's illegal activities. . . ."[67] (OIC Ex. 100.) Brill's letter did not address the question of whether BNL-Rome knew, because she did not think such an answer was called for. (Brill Tr. 102-103.)

[67]The failure to consult Clark about the September 4 CIA letter or the September 11 Sentencing Memorandum is even more difficult to understand, given the fact that Brill thought it prudent to consult him on her response to Cook.

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That same week, Brinkac drafted a memorandum dated September 11, 1992 to Urgenson captioned "Status Report on Fraud Section Efforts to Obtain Information From Federal Agencies on Behalf of the Northern District of Georgia." (OIC Ex. 212.) The memorandum sets forth in detail the requests for intelligence information by DOJ in 1990 and 1992, and the responses to these requests. Brinkac says she prepared this memo because she was leaving the Fraud Section, and thought the information might be useful in the future. (Brinkac Tr. 33-34.)

V. THE GONZALEZ PRESS RELEASE - SEPTEMBER 14

On September 14, 1992, Representative Gonzalez issued a press release alleging that the CIA had information in its files showing that BNL-Rome authorized the loans to Iraq made by BNL-Atlanta. (OIC Ex. 214.) Specifically, the press release quotes the CIA information as saying:

> Most of the [CIA] reports repeated information available in the press . . .. The exceptions are that BNL financing helped pay for the Condor II missile project, and confirmation of press allegations that more senior BNL officials in Rome had been witting of BNL-Atlanta's activities.

(OIC Ex. 214.)

Representative Gonzalez's press release further alleged that this information was in "direct conflict" with the USAO's theory that Drogoul and BNL-Atlanta had acted independently of BNL-Rome. On the same day, Representative Gonzalez went to the House floor and criticized the DOJ for pursuing a "politically conven-

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ient" but inaccurate theory in the BNL-Atlanta case. (OIC Ex. 213.)

Representative Gonzalez based his statement and press release on notes that his staff member, Dennis Kane, had taken when he viewed [redacted] Analytical Comment B in the October 1991 CIA Summary.[68] As noted above, there is no record that anyone at DOJ received or knew about this CIA Summary before Representative Gonzalez's September 14 press release. [redacted] at the CIA was on the routing list for this CIA Summary back in 1991, but he denied having seen it, and he made no reference to it in the CIA's September 4 letter. ([redacted] Tr. 50; Holmes Tr. 59, 71.) Holmes denied knowing about the CIA Summary before he signed the September 4 letter. (Holmes Tr. 51.)

VI. THE COMMENCEMENT OF THE DROGOUL SENTENCING HEARING -- SEPTEMBER 14

On the same day that Representative Gonzalez issued his press release and made his statement, the Drogoul sentencing hearing commenced before Judge Shoob. In his opening statement, defense counsel Cook alleged that the U.S. intelligence agencies and BNL-Rome had known contemporaneously of BNL-Atlanta's unauthorized loans to Iraq. On the second day of the sentencing hearing, September 15, Cook referred in open Court to the allegations in Representative Gonzalez's press release and his House statement,

[68]The fact that the Gonzalez press release on this subject was not issued for almost a year after Kane made notes on the Summary suggests that Representative Gonzalez did not believe that the information was too significant.

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and claimed that the DOJ was involved in a cover-up for political and foreign policy reasons.[69]

The USAO clearly was surprised by the Gonzalez press release and the Cook allegations. (McKenzie Tr. 116-20.) The USAO believed that the information they had previously received from Clark and Meltzer, as well as their personal review of the CIA materials in Washington, contradicted the claims by Representative Gonzalez and Cook.

VII. REACTION AT DOJ-- SEPTEMBER 14 - 16

Mueller, Urgenson, Richard, and Meltzer at DOJ were also taken by surprise by the Gonzalez and Cook statements because they had neither seen nor heard of the CIA Summary. (Mueller Tr. 124.) Nevertheless, they recognized that Representative Gonzalez's statements had created the public impression that the DOJ was withholding or misrepresenting information in the BNL-Atlanta case, and that some response would be necessary. (Mueller Tr. 115-117.)

When the DOJ received the Summary from the CIA during the day on September 15, they proceeded to compare the Analytical Comment B, which suggested that BNL-Rome was "witting", with Items E, F and J in the Summary that summarized cables dated 5 October 1989, 20 October 1989 and 21 February 1991. (Mueller Tr. 113-115; Urgenson Tr. 20, 203.) Mueller and Urgenson also reviewed the

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[69]The transcript of the proceedings reflects that Cook continued to receive, and make reference to, Congressional statements throughout the sentencing hearing.

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cables underlying the Summary shortly thereafter.[70] (Mueller Tr. 114.; Urgenson Tr. 199-200.)

After their review, Mueller, Urgenson, and Meltzer noted that the Comment did not expressly say that BNL-Rome officers knew contemporaneously of BNL-Atlanta's unauthorized loans to Iraq, as the Gonzalez press release alleged.[71] They further determined that, even if the Comment could be read to say that "BNL-Rome knew," that conclusion was not supported by Items E, F and J of the Summary.

In particular, they noted that Item J, which summarized the 22 February 1991 cable, [redacted] but mentioned no time frame and did not indicate that the loans referred to were BNL-Atlanta's illegal loans. Similarly, Item F, which referred to a 22 October 1989 cable, contained only a source's opinion about what [redacted] were speculating, and had no firm proof. Finally, Item E, which referred to the 5 October 1989 cable, also contained a source's opinion that BNL-Rome must have known [redacted]

[70]Meltzer located the underlying cables forming the basis for the Summary in the Fraud Section's safe. (Urgenson Tr. 203.) An E-Mail from Meltzer at 10:28 p.m. reflects that she left the four cables referenced in the CIA Summary for Mueller and Urgenson at the DOJ Command Center on the night of September 15.

[71]Mueller noted that "Analytical Comment B" states only that BNL-Rome officers were "witting" of BNL-Atlanta "activities," without saying whether that knowledge was contemporaneous and whether that knowledge was of "illegal" activities. (Mueller Tr. Vol.2, 36-39.)

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[redacted] without specifically identifying the time frame or whether this was an "off-book" loan. (Mueller Tr. 114-117; Urgenson Tr. 206-208, 210-212.) [redacted]

In addition, Clark had reviewed the Summary and opined in a September 15 E-Mail to Urgenson that the analytical conclusions in the Summary were incorrect. (OIC Ex. 98; Urgenson Tr. 200; Clark Tr. 203-210.)

Richard at the DOJ then contacted the CIA for an explanation for the apparent discrepancy between the Comment and Items F and J in the Summary, and to determine whether the CIA had any additional information that might support the Comment. (Mueller Tr. 118; Urgenson Tr. 214.) Mueller does not recall anyone discussing the need to review thoroughly all the intelligence information in the DOJ files on the subject of what BNL-Rome knew. Mueller did recall that Meltzer had gone through the Fraud Section safe, and briefly looked at the cables, when she located three of the four CIA cables referenced in the CIA Summary. (Mueller Tr. 121, 127, 131.)

When Richard was unable to get an explanation from the CIA, Mueller began talking directly with Holmes about that subject, and whether there was anything that CIA could make public that would respond to Representative Gonzalez's press release.[72] (Mueller Tr. 109-110, 131, 133, 147-148; Holmes 55-56.) Since the

[72]During this period, DOJ's Richard, Meltzer and Urgenson were also exchanging telephone calls with CIA's Holmes, [redacted], Jameson and Rizzo. (Urgenson Tr. 216; Cooper Tr. 112.) In Urgenson's view, it was a "chaotic" time. It is difficult to reconstruct with precision who said what to whom, and when it was said.

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CIA cables at issue were classified, it was not possible to make them public.[73]

VIII. THE USAO'S ANALYSIS OF THE CIA SUMMARY

The USAO received the CIA Summary and facsimile copies of the four relevant underlying cables from DOJ on September 16.[74] (McKenzie Tr. 118, 121-122.) After reviewing these documents, the USAO and the Task Force agents concluded that the underlying cables did not support the Summary.[75] As a result, the USAO requested that the DOJ get the materials declassified so that they could be shown to the Court. (McKenzie Tr. 123-127.) According to McKenzie:

> I don't know that they [DOJ] didn't have the same thought the second they saw them [the Summary and cables]. But nobody had to tell us to make these public. It was a non-issue. Get it on the record so that it can be addressed.

(McKenzie Tr. 126-127.)

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[73]Urgenson believed that Richard initially attempted to get the Summary and the underlying cables declassified "just to lay it out, to be able to address it and put it forward." (Urgenson Tr. 216.)

[74]Meltzer received a copy of the Summary from the CIA via secure facsimile (OIC Ex. 50) and sent it via facsimile to the FBI in Atlanta for transmittal to the USAO. She also sent copies of the four cables underlying the Summary. (OIC Ex 51.; Brill Tr. 132.)

[75]McKenzie said she was more focused on witness preparation for the ongoing sentencing hearing. Brill said that the Task Force was more knowledgeable on this issue than she was. (Brill Tr. 138; McKenzie Tr. 122.)

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IX. REACTION AT THE CIA - SEPTEMBER 14-16

On or shortly after September 14, Holmes recalls receiving a telephone call from Richard, who was very upset, saying that there was a "firestorm" brewing at DOJ over the Gonzalez press release. Holmes also remembers receiving several angry telepone calls from Mueller regarding the numerous press inquiries that the DOJ was receiving about Representative Gonzalez's allegations, and asking why the CIA had never sent the October 1991 CIA Summary to the DOJ. (Holmes Tr. 53-55.) In Holmes' view, Mueller had a huge public relations problem, which he believed the CIA had caused, and he wanted the CIA's help in resolving that problem. (Holmes Tr. 61.)

[redacted] was in the office with Holmes as he received the various DOJ telephone calls inquiring about the subject of the Gonzalez press release. Holmes assigned [redacted] to determine what information Representative Gonzalez was referring to, and [redacted] obtained a copy of the Summary from [redacted] in the Office of Congressional Affairs. ([redacted] Tr. 111-113.) [redacted]

Although Holmes had asked Jameson and [redacted] for a full explanation on the CIA Summary, he was having difficulty obtaining an answer, and was concerned that [redacted] did not seem to have a "grasp of the facts." (Holmes Tr. 59, 79.) In particular, Holmes wanted to know first whether [redacted] had seen the CIA Summary before (Holmes Tr. 49), and whether that information was inconsistent with the DOJ's theory of the case. (Holmes Tr. 64-65.) He was not focused on whether there was an inconsistency between the Summary

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and the answer to Question 8 in the September 4 letter. (Holmes Tr. 62, 66-67.)

When Holmes raised this issue with Director Gates of the CIA during the course of a breakfast meeting on September 16, Gates advised that he was not inclined to issue any press release to explain the CIA Summary. (Holmes Tr. 65, 74.) Instead, Gates suggested that the CIA "help out" the DOJ as much as possible, perhaps by providing some statement to be incorporated in a DOJ press release. (Holmes Tr. 76.)

X. THE SEPTEMBER 17, 1992 CIA LETTER

On September 17, a declassified version of the CIA's September 4 letter was prepared (OIC Ex. 216), in the form of a new letter from Holmes to Brill that adopted verbatim the ten responses contained in the September 4 letter, including the response to Question 8. The record is unclear as to who specifically released this letter to the public, and when it was released. The September 17 letter was used as an exhibit by Cook at the Drogoul sentencing hearing.

The idea of seeking a declassified version of the CIA's September 4 letter was first raised in a discussion between Mueller, Urgenson and Richard shortly after the Gonzalez September 14 press release.[76] Mueller says that he did not focus on whether the answer to Question 8 in the letter about "publicly available"

[76]Mueller does not recall who first suggested seeking a declassified version of the September 4 letter. (Mueller Tr. 136-138, 140.)

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information was now incomplete, given the CIA's disclosure of private-source information in the CIA Analytical Comment B and three of the underlying cables that "BNL-Rome knew." Nor did Mueller attempt to avoid further surprises by directing that all the BNL intelligence information in the DOJ's files should be reviewed before releasing the letter. Rather, he focused on the fact that the September 4 letter was the most recent statement by the CIA on the subject of whether BNL-Rome knew, and he wanted Judge Shoob and the public to be advised that the DOJ had received and relied in good faith on that statement. (Mueller Tr. 138-141, 145-146, 158-159.)

Urgenson agreed with this approach, because he believed that every relevant document should be put before Judge Shoob. (Urgenson Tr. 218.) In Urgenson's view the September 4 letter was the only accurate statement of what the CIA had told the DOJ. (Urgenson Tr. 218.) According to Urgenson:

> [T]he relevant issue . . . was what did the Department of Justice know and when did they know it. And what were the communications between the CIA and the Department of Justice . . .. And I thought it was important and fair and right to get out to the Court and everyone else that what they had told us was not what they were putting in the newspapers . . .. That we had not been told, as the newspapers implied, that BNL-Rome was involved and engaged in a conspiracy. What we had just been told is that they are not involved in illegal activities.

(Urgenson Tr. 218-219.)

Between September 14 and 17, Urgenson had several conversations with Jameson and Holmes at CIA as to whether the September

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4 letter could be released without changing the answer to Question 8. (Urgenson Tr. 221.) Jameson raised with Urgenson his concern that the answer might have to be changed to make it "more complete," such as by adding a parenthetical explanation, which Jameson did not specify, that the CIA had certain speculative information. (Jameson Tr. 134.) According to Jameson, Urgenson "strongly advise[d]" that the answer not be changed for the sake of consistency, and warned him that any change would require a full explanation and might be read to suggest something that was never intended. (Jameson Tr. 135-136.) Jameson agreed that "even a single word change sometimes is more trouble than it's worth." (Jameson Tr. 136.) He also stated that ultimately Urgenson told him that the CIA had to decide whether a change was necessary. Jameson kept Holmes informed of his discussions with Urgenson and Holmes concurred with Jameson's recollection. (Holmes Tr. 94-95.)

Holmes and Jameson concluded that, although the answer to Question 8 could contain additional information, it should not be changed, for the sake of consistency. (Holmes Tr. 94-95; 109.) They both believed that the answer was accurate and complete, and

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Holmes said that they did not intend to be misleading.[77] (Holmes Tr. 95, 132-133; Jameson Tr. 134.)

Urgenson has a different recollection of his conversations with Jameson concerning the response to Question 8 in the September 17 letter. He does not recall "strongly advising" Jameson not to change the answer, but he does recall being worried about the public perception of any change:

> [I]n this atmosphere. . . we would be accused of having doctored the evidence, gotten together in a meeting over the phone and decided after the fact to deceive the public and the Court with a new answer.[78]

(Urgenson Tr. 230.)

Urgenson was not particularly concerned about the substance of the answer to Question 8. He considered it to be accurate based on his knowledge of the underlying cables,[79] and certainly more accurate than the Analytical Comment B in the CIA

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[77]Holmes says that, with hindsight, he should have added that the CIA had other classified information that mentioned BNL-Rome's knowledge, but did not permit any definitive conclusion about whether BNL-Rome knew about illegal activity at BNL-Atlanta. (Holmes Tr. 93, 96.) Holmes first began to question his judgment on this letter after meeting with the Staff of Senator Boren's Committee on September 28. He left that meeting thinking that the answer to Question 8 was "technically correct," but might be misleading to the public. (Holmes Tr. 95-96, 108, 116-117, 135-137.)

[78]Urgenson called this the "Kloske" problem (referring to the Under Secretary for Export Administration, Department of Commerce). (Urgenson Tr. 223, 203, 233.)

[79]At that time, Urgenson did not personally review any cables.

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Summary relied on by Representative Gonzalez.[80] (Urgenson Tr. 232-235.) At the time, Urgenson thought that the CIA was going to issue a full explanation of the Summary, regardless of the substance of the answer to Question 8. He further thought that Judge Shoob would not be misled, because he was going to receive the CIA Summary, the underlying cables, and the CIA's explanation very shortly. (Urgenson Tr. 224-227,.229.)

The DOJ had another private-source CIA cable in its files that suggested "BNL-Rome knew." That cable was dated 12 January 1990, and reported [redacted] (OIC Ex. 59.)

XI. THE CIA STATEMENT PREPARED ON SEPTEMBER 18

Prior to September 18, 1992, Mueller had talked to Holmes at CIA about a statement from the CIA, for release by the DOJ, that would explain the apparent discrepancy between the Analytical Comment B in the CIA Summary and the underlying cables. (Mueller Tr. 147.) Holmes had advised Mueller that he was working on such a statement. (Mueller Tr. 147-153; Holmes Tr. 119.) However, late on Friday, September 18, Holmes called Mueller and said that he had had difficulty coordinating the statement with all the sections at

[80]Holmes did not believe that the answer had to be changed in light of the CIA Summary; he thought the Comment was not supported "from an evidentiary standpoint" by the cables. (Holmes Tr. 107-115.) He also assumed that the Court had seen, or would ultimately see, the Summary along with the letter, and draw its own conclusions. (Holmes Tr. 96, 117-118, 134.)

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the CIA, and that the DOJ would probably not be satisfied with the statement, but it was the best the CIA could do. (Mueller Tr. 147; Holmes Tr. 119, 122-123.)

The statement, which was faxed to Mueller on Friday evening, September 18, read:

> (T)he Department has revieved the CIA summary provided to Representative Gonzalez, as well as the underlying intelligence reports. The Department believes that neither the summary nor the reports permit the definitive conclusion that BNL-Rome was aware at BNL-Atlanta was engaged in illegal activities, and further believes that the CIA information does not conflict with the prosecution's theory of the case. Both the Department of Justice and the CIA are prepared to have Judge Shoob review the relevant materials which we believe will speak for themselves.

(OIC Ex. 60.)[81]

In Mueller's view, the statement was inadequate primarily because it did not explain the apparent discrepancy between the Summary and the cables, and implied that the CIA's information permitted the conclusion, although not a "definitive" conclusion, that BNL-Rome had contemporaneous knowledge of illegal activities at BNL-Atlanta. Mueller did not believe that the four underlying cables or the CIA Summary supported this conclusion, and was not aware of any other information that would support such a statement.[82] (Mueller Tr. 154; Holmes Tr. 129-130.)

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[81]John Helgerson, the CIA's Deputy Director of Intelligence, added the language that the CIA's information did not permit the "definitive conclusion" that BNL-Rome knew. (Holmes Tr. 120-121.)

[82]No one at DOJ had revieved the intelligence information, or consulted with Clark, to determine whether Mueller's understanding on September 18 was correct.

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Following his review of the statement, Mueller called Holmes to tell him it was unsatisfactory. According to Holmes, Mueller called the statement "laughable." (Holmes Tr. 123.) As a result of Mueller's objections, the statement prepared by CIA was never released. It was at this point that Mueller decided to present the Summary and the underlying cables to Judge Shoob, so that the Court could determine whether there was a discrepancy between the Summary's Analytical Comment B and the underlying cables, and whether Representative Gonzalez's allegations were supported. (Mueller Tr. 131-132, 155-156.)

XII. THE SEPTEMBER 17, 1992 DIA LETTER

The DIA also sent a declassified version of its September 4 response in the form of a new letter from Berry to Brill, dated September 17, 1992. (OIC Ex. 89.) Berry wrote the letter after receiving a telephone call from Meltzer on September 17, in which she requested a letter to Brill confirming the answer in the DIA's September 4 letter. (Berry Tr. 59-60.) In preparing the September 17 letter, Berry spoke at least twice with Meltzer on the telephone and sent copies via facsimile to Brill and Meltzer when the letter was finished. (Berry Tr. 60.)

The DIA September 17 letter, in relevant part, stated as follows:

> Specifically, in response to the 1 September 1992 DOJ letter to DIA, DIA had no information in its files concerning the ten questions other than comments on and repetition of

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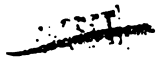

publicly available information dating from after September 1989 concerning BNL-Rome and its relation with BNL-Atlanta.

(OIC Ex. 89.) (Emphasis added.)

In drafting the response in this manner, Berry was able to exclude mention of the 12 September 1989 cable from [redacted] in that the [redacted] cable is dated during September 1989 and the letter refers to information after September 1989. Berry stated that he and William J. Allard, DIA's General Counsel, deliberately worded the letters in such a manner to "carve out" the [redacted] cable. (Berry Tr. 64.)

Berry stated that the DIA's effort to omit the [redacted] cable was not based on concerns about the substance of the cable, which the DIA had followed up on and considered to be inaccurate (Berry Tr. 15-23), but instead was based on Meltzer's request for an "unclassified" letter that would give the BNL judge a "warm fuzzy." (Berry Tr. 63, 65-67.) According to Berry, Meltzer told him that "Gerrilyn Brill needed something unclassified" and "[a] simple confirmation would be sufficient." (Berry Tr. 66.) Berry recalled that he discussed the substance of the September 17 letter with Meltzer over the telephone, but did not specifically discuss how to deal with the [redacted] cable. (Berry Tr. 64-65.)

XIII. THE REQUEST FOR AN UNCLASSIFIED NSA LETTER

On September 17, 1992, Meltzer also asked Kennedy at NSA for an unclassified letter responding to the DOJ's September 1 questions. Meltzer said the sentencing hearing was not going well, and that she wanted a one-line NSA letter for use in Court that

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essentially said that the answer to each of the September 1 questions was "No." (Kennedy Tr. 46-47, 56.)

Kennedy responded that he would take it up with his superiors, and suggested that the DOJ also make "an approach on a higher level." Kennedy then discussed Meltzer's request with NSA General Counsel Baker and Assistant General Counsel Potenza, and they in turn asked the NSA classification office to declassify the NSA's September 9 letter. (Kennedy Tr. 47-50.) Kennedy also prepared a unclassified draft of a letter answering the DOJ's September 1 request, but Baker declined to sign that letter because he was concerned that it might be misconstrued. (Kennedy Tr. 60; Stewart Baker Tr. 9-11.)

XIV. THE SEPTEMBER 21, 1992 MEETING

In anticipation that Judge Shoob would be receiving the September 17 letter as well as the CIA Summary and underlying cables, Urgenson, upon Mueller's advice, organized a meeting at DOJ with the CIA on September 21, to discuss the presentation of classified materials to Judge Shoob and to obtain an explanation of the Summary. (Urgenson Tr. 248; Jameson Tr. 155-156.) The meeting was attended by Urgenson, Clark and Meltzer of DOJ, and Jameson, [redacted] and [redacted] of the CIA. (Urgenson Tr. 248-249.)

At the meeting, [redacted] stated that the language in the Summary was not intended to convey what Representative Gonzalez was now saying on the floor of the House and to the press. She explained that her use of the word "confirmed" in Analytical

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Comment B in the Summary was not intended to assess the accuracy of information in the underlying cables. Rather, it reflected that a private source had provided the same information as a press source, thus showing corroboration of the press source, but not necessarily validating the information itself.[83] [redacted] also noted that her word "activities" and the time frame were deliberately left ambiguous, because the cables did not show that BNL-Rome had contemporaneous knowledge of "illegal activities" at BNL-Atlanta. Urgenson, among others, found these technical distinctions "a little hard to parse." ([redacted] Tr. 99-103; Urgenson Tr. 249.)

Gerrilyn Brill, telephoned the September 21 conference room from Atlanta, and told them that she had released a public statement regarding Representative Gonzalez's, September 14 press release and the CIA Summary. Specifically, Brill's statement read:

> I have reviewed the CIA report referenced in Chairman Gonzalez's September 14, 1992, press release, as well as the cables supporting the report. Mr. Gonzalez's statements in the press release are not supported by any of these documents. There is no evidence contained in either the report or the cables that BNL officals outside of Atlanta or the U.S. government had contemporaneous knowledge of Mr. Drogoul's criminal activity.

According to Urgenson, since Brill's statement was not critical of the Summary, the CIA had no objections to it. The meeting ended shortly thereafter with the understanding that Brill

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[83]According to Urgenson, [redacted] acknowledged that "lends credence to" would have been a more accurate choice of words than "confirms." (Urgenson Tr. 249.)

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would present all the documents to Judge Shoob.[84] (Urgenson Tr. 248-251; Brill Tr. 172-173.)

XV. THE DROGOUL SENTENCING HEARING--SEPTEMBER 17

As part of their presentation at the Drogoul sentencing hearing, the USAO put on a "summary witness," Arthur Wade, to testify about the evidence of Drogoul's wrongdoing. During the cross-examination of Wade on September 16, the Court asked several questions regarding intelligence information that the Task Force had received, and Wade gave the following answers:

> The Court: Let me ask you this, Mr. Wade: In your direct testimony were any of your opinions or statements based on information that you derived from any cables that were either secret, top secret, or marked confidential?
>
> The Witness: The testimony that I gave was based on evidence other than classified materials, something that was from another source.
>
> The Court: But you did have access to classified materials, is that correct, in connection with your investigation?
>
> The Witness: Yes, sir.
>
> The Court: But what you're saying is that your testimony was not based on that information but from information from independent sources?
>
> The Witness: Yes, sir.
>
> The Court: And did the information in those cables lead you to information from independent sources?
>
> The Witness: I can't recall an instance where . . . it led to another independent source.

[84]Urgenson noted that no one from the CIA voiced any objections "until Congress began to ask them questions. That's when they became uncomfortable. . .." (Urgenson Tr. 235; 251.)

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The Court: It may have but you don't know, is that what you're saying?

The Witness: It's possible, but I -- the cables were not made available until later on when most of the leads were already developed and were themselves generating leads. It was not early on.

The Court: And did any information that you received through these confidential or secret cables indicate to you that maybe you had taken the wrong path or reached the wrong conclusion as to certain events that had occurred?

The Witness: No, sir, just the opposite.

The Court: They confirmed it?

The Witness: They confirmed what was said earlier, that it was not contemporaneous knowledge or anyone within BNL.

The Court: And you haven't seen any cables that indicated otherwise?

The Witness: There were suppositions and speculations in some cables, and those speculations were similar allegations made either in the press on in independent source to the allegation in that document. They were pursued.

(OIC Ex. 101.)

Wade testified in this investigation that his answer that the cables "confirmed" the prosecution theory of the case was not misleading, although he acknowledged that his response to Judge Shoob from the witness stand could have been "more artfully stated." (Wade Tr. 83.) Wade answered the Court's question by assuming that Judge Shoob was referring to all the cables. From Wade's standpoint, the fact that he had seen no cables beyond speculation or supposition gave him "comfort" that this was "not something approved or authorized by any of the U.S. government agencies, or that our intelligence had picked up from other

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intelligence sources all over the world." (Wade Tr. 84.) Wade also noted that he followed up his "confirm" response by stating that there were other cables, containing in his view, unsupported allegations, suppositions and speculation. (Wade Tr. 83.) Finally, Wade stated that he was uncomfortable testifying before "half the world, sitting in the courtroom" about what he considered to be "classified material," and that this discomfort inhibited his responses. (Wade Tr. 83, 85-87.)

On September 17, Cook moved to withdraw Drogoul's guilty plea, primarily on the grounds that United States foreign policy with Iraq had prejudiced his client's defense. The USAO objected, and the Court denied the motion on September 21.

XVI. THE COURT REVIEWS THE GONZALEZ SUMMARY - SEPTEMBER 23

On September 23, the USAO provided the Court with the CIA summary and the four underlying cables. The prosecutors offered to have CIA officials explain these cables to the Court in camera, but the Court rejected this suggestion. The next day, September 24, the Court advised that the four underlying cables did not appear to support the conclusion that BNL-Rome knew of BNL-Atlanta's illegal loans. Several days later, however, after another statement from Representative Gonzalez that offered a contrary view, the Court reversed its opinion, and stated that some of the cables supported the conclusion that BNL-Rome knew.[85] On September 25, Judge Shoob asked Brill to send a letter to the CIA asking several questions

[85]I am not suggesting that Judge Shoob was influenced by Representative Gonzalez's view of the Summary and cables..

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regarding the intelligence information that had been gathered regarding BNL. Brill sent a letter to Holmes that same day. (OIC Ex. 64.) Four days later, Judge Shoob asked Brill to send a follow-up letter reiterating these same questions. (OIC Ex. 65.) On September 30, Holmes responded to both letters by offering to meet with Judge Shoob in order to explain fully to him the answers to his questions. (OIC Ex. 66; Holmes Tr. 142-143.) The CIA said that explanation never was given because of Drogoul's renewed motion to withdraw his plea.[86]

XVII. DROGOUL RECANTS HIS EARLIER STATEMENTS

On September 29, Drogoul took the stand at the sentencing hearing, and began to recant what he had said previously. Specifically, Drogoul testified in specific terms, for the first time, that BNL-Rome officials knew about his activities and authorized them. Based on this testimony, the USAO agreed to permit Drogoul to withdraw his guilty plea on October 1. Mueller said that this decision was made by the USAO without direction from DOJ. (Mueller Tr. Vol. 2, 23-26.)

On October 1, 1992, Judge Shoob orally granted Drogoul's motion to withdraw his guilty plea.

[86]The CIA prepared several other draft responses to Brill's letters of September 25 and 29. (OIC Ex. 67.) The substance of those drafts is essentially consistent with Holmes's testimony.

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XVIII. THE DISCOVERY OF NEW INFORMATION

The CIA's Office of the Inspector General has advised us of a recently discovered 30 October 1991 CIA operational cable that reported in paragraph 3:

[redacted]

There is no record that the CIA followed up on this report. However, the information I have reviewed during this investigation suggests that this report may be less significant than it appears on its face. [redacted]

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LEGAL ANALYSIS AND RECOMMENDATIONS

I. THE INDEPENDENT COUNSEL STATUTE

Pursuant to the Independent Counsel statute, upon conclusion of my preliminary investigation,[87] I must determine whether there are "reasonable grounds to believe that further investigation" of potential or alleged wrongdoing prohibited by federal criminal law is "warranted." 28 U.S.C. §§ 592(b)(1) and 592(c)(1)(A). In making this determination, I turn to the following criminal provisions which would likely be considered by a Statutory Independent Counsel if appointed: 18 U.S.C. § 1503; 18 U.S.C. § 1505, and 18 U.S.C. § 1001.

As set forth below, each of these criminal statutes requires specific conduct performed with "mens rea" or state of mind. The Independent Counsel statute, however, only permits me to determine that state of mind is lacking if I can find that there is "clear and convincing evidence" of its absence. 28 U.S.C. § 592 (a)(B)(ii). The statute thus creates a virtual rebuttable

[87]In my October 26, 1992, letter to the Attorney General (Ex. 3) in which I recommended a preliminary investigation, I did not distinguish between so-called "covered" persons, defined in 28 U.S.C. § 591(b), and non-covered persons referred to in § 591(c). As to "covered persons," the Independent Counsel statute mandates a preliminary investigation when "information sufficient to constitute grounds to investigate" has been received (§ 591 (a)). As to persons not considered "covered," a preliminary investigation is discretionary under the same circumstances. In his October 27, 1992 letter to me, in accepting my recommendation, the Attorney General asked: (a) that I commence such preliminary investigation, and (b) that I attempt to conclude it by December 8, 1992, six days before expiration of the Independent Counsel statute. As a review of this Report reveals, my investigation has been wide-ranging and has included within its reach both individuals considered "covered" persons by the statute and those not considered "covered" persons.

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presumption of the statutory state of mind, a presumption that may be rebutted only by "clear and convincing evidence."

A. 18 U.S.C. §1503

Section 1503 generally proscribes the obstruction of the "due administration of justice," in connection with a judicial proceeding, by corrupt endeavor. The use of the term corruptly, together with the term endeavor, "charges an intentional act." United States v. Haas, 583 F.2d 216 (5th Cir. 1978), cert. denied, 440 U.S. 981 (1979). Generally, the Government must demonstrate that the person charged with a § 1503 offense "knowingly and intentionally undertook an action from which an obstruction of justice was a reasonably foreseeable result." United States v. Thomas, 916 F.2d 647, 651 (11th Cir. 1990) (citations omitted) (emphasis added).

The term "corruptly" connotes specific intent. See United States v. Machi, 811 F.2d 991, 996 (7th Cir. 1987) ("Corruptly means to act with the purpose of obstructing justice."); United States v. Partin, 552 F.2d 621, 641 (5th Cir.), cert. denied, 434 U.S. 903 (1977) ("The word corruptly means a defendant acted with improper motive or with bad or evil or wicked purpose."); United States v. Jeter, 775 F.2d 670 (6th Cir. 1985), cert. denied, 475 U.S. 1142 (1986) (Section 1503's mens rea requirement limits the scope of the statute to persons "who

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'corruptly' or intentionally seek to obstruct the due administration of justice.")[88]

The term "endeavor" has been held to describe "any attempt or effort to obstruct justice." Thomas, 916 F.2d at 651 (citation omitted); see also Buffalano, 727 F.2d at 53 (defining endeavor "as 'any effort or essay to accomplish the evil purpose that the statute was enacted to prevent'") (quoting United States v. Russell, 255 U.S. 138, 143 (1921)). The government need not demonstrate that the endeavor was ultimately successful or that it achieved the desired result. See, e.g., Osborn v. United States, 87 S. Ct. 429, 434-435 (1966); Jackson, 513 F.2d at 460 ("[I]t is the endeavor to bring about the forbidden result, and not success in achieving the result, that Section 1503 makes a crime."); Thomas, 916 F.2d at 651. However, the court in Brand noted that

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[88]Both the Fourth and Eleventh Circuits have departed somewhat from the specific intent requirement as framed by other Circuits. A recent Eleventh Circuit decision, defining the term "corruptly," constricted the specific intent element as follows:

> "'Corruptly'" describes the specific intent of the crime and can vary in meaning with the context of the section 1503 prosecution . . .. Although the government is not required to prove that the defendant had the specific purpose of obstructing justice . . . it must establish that the conduct was prompted at least in part, by a corrupt motive.

United States v. Thomas, 916 F.2d 647, 651 (11th Cir. 1990) (citations omitted); see also United States v. Neiswender, 590 F.2d 1269, 1274 (4th Cir.), cert. denied, 441 U.S. 963 (1979) (holding that "a defendant who intentionally undertakes an act or attempts to effectuate an arrangement, the reasonably foreseeable consequence of which is to obstruct justice, violates 18 U.S.C. § 1503 even if his hope is that the judicial machinery will not be seriously impaired.").

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§ 1503 proscribes only those acts which produce or which are capable of producing an effect that prevents the due administration of justice. 775 F.2d at 1465.

B. 18 U.S.C. §1505

Section 1505 of the obstruction of justice statute applies broadly to all pending proceedings, including Congressional proceedings. Section 1505 also requires proof of specific intent, or a corrupt endeavor, to sustain a conviction.

Other than the celebrated cases arising out of the Iran-Contra scandal (see United States v. North, 708 F. Supp. 385 (D.D.C. 1988), and United States v. Poindexter, 951 F.2d 369 (D.C. Cir. 1991)), only a handful of decisions under § 1505 have considered alleged obstructions of Congressional "proceedings." See, e.g. United States v. Mitchell, 877 F.2d 294 (4th Cir. 1989), reh'g denied, 1989 U.S. App. LEXIS 13462 (4th Cir. 1989).

The requirement of § 1505 that the defendant has acted "corruptly" is given similar meaning to the "corrupt" element of § 1503. In United States v. Price, 951 F.2d 1028, 1031 (9th Cir. 1991), the court held that the "requisite intent to violate Section 1505 is . . . merely that the 'defendant must have acted 'corruptly,' i.e., that the act must be done with the purpose of obstructing justice'" (citation omitted). A similar definition was adopted in United States v. Laurins, 857 F.2d 529, 536-37, where the court held that the defendant acted corruptly by concealing documents in response to an IRS subpoena.

The District of Columbia Court of Appeals in United States v. Haldeman, 559 F.2d 31 (D.C. Cir. 1976), construing § 1503, adopted a variation of the definitions above, holding that

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the term "corruptly" means having an evil purpose or intent. See also United States v. Sprecher, 783 F. Supp. at 164 ("'Corruptly' simply means to be motivated by an improper purpose") (citations omitted).[89] In North, however, the court cautioned:

> Unlike courts of law covered by section 1503, congressional committees are part and parcel of a political branch of government and therefore serve wide-ranging political functions not limited to a search for truth in accordance with formal rules . . . . No one can seriously question that people constantly attempt in innumerable ways, to obstruct or impede congressional committees . . . but it does not necessarily follow that [it] is . . . [done] corruptly.

The Court of Appeals in United States v. Poindexter, 951 F.2d 369, 379 (D.C. Cir. 1991), in an opinion authored by then Judge Ginsburg, construed more strictly than any other court the scope of sanctionable conduct under § 1505. The Poindexter decision is an apparent retrenchment from the prior decisions of the District of Columbia Court of Appeals (see North, supra, United States v. Lavelle, 751 F.2d 1266 (D.C. Cir.), cert. denied, 474 U.S. 817 (1985)) on the applicability of § 1505 to Executive Branch officials, although the court did not expressly overrule those decisions.

In Poindexter, the defendant was charged with obstructing congressional inquiries into the Iran-Contra scandal. The

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[89] The absence of "illegal means" does not mean that the allegedly violative conduct is not corrupt. Mitchell, 877 F.2d at 298. The court in Mitchell stressed that the crucial inquiry focuses on "whether a defendant had the requisite corrupt intent to improperly influence the investigation, not on the means the defendant employed in bringing to bear this influence." Id. at 299.

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Poindexter court deemed the term "corruptly" as used in § 1505 to be so vague as to "provide [no] constitutionally adequate notice that it prohibits lying to Congress." Poindexter, 951 F.2d at 379. In an elaborate analysis of the statute, the court suggested that acting "corruptly" oneself would not necessarily be violative of § 1505, and interpreted the statute to proscribe corrupting another by influencing that individual to violate his own legal duty.

With the notable exception of Poindexter, courts interpreting § 1505 have generally construed broadly the range of "endeavors" covered by § 1505. In Mitchell, for instance -- a case proscribing an endeavor to stop a congressional investigation -- the court held that any effort or act "when done with the requisite intent to corruptly influence a congressional investigation, violates [§ 1505]." Mitchell, 877 F.2d at 299.

Endeavors proscribed by § 1505 have included directing an individual to destroy records responsive to a DOE subpoena, Sutton, supra; supplying false testimony and directing an individual to alter sales invoices and submit them to an inquiring agency, Fruchtman, supra; deliberately concealing matters material to an SEC investigation, Sprecher, supra; submitting a false document in response to a subpoena issued by the IRS, United States v. Vixie, 532 F.2d 1277 (9th Cir. 1976); supplying evasive answers and concealing knowledge (i.e., feigning forgetfulness) in testimony at SEC investigative hearings, United States v. Alo, 439 F.2d 751 (2d Cir.), cert. denied, 404 U.S. 850, reh'g denied, 404 U.S. 961 (1971); altering, concealing, or withholding records which, according to the indictment, bore a "reasonable relation" to the subject matter of a Senate Committee inquiry, United States v.

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Presser, 292 F.2d 171 (6th Cir. 1961), aff'd by an equally divided court, 371 U.S. 71 (1962); and influencing a witness to give false information and testimony to a Senate Committee and its investigators, Stein v. United States, 337 F.2d 14 (9th Cir. 1964), cert. denied, 380 U.S. 907 (1965).

C. 18 U.S.C. §1001

Section 1001 proscribes (1) the knowing and willful falsification or concealment of a material fact; (2) the making of any false or fraudulent statement or representation; and (3) the making or using of a false writing or document with knowledge that it contains a false or fraudulent statement "in any matter within the jurisdiction of any department or agency of the United States."

A "concealment" is an "affirmative act by which a material fact is actively concealed." It must be more than a mere passive failure to disclose. U.S. v. Shannon, 836 F.2d 1125, 1130-31 (8th Cir.), cert. denied, 486 U.S. 1058 (1988). A "false statement" is a statement which "is designedly untrue . . . and made with intention to deceive the person to whom the false statement is made or exhibited." U.S. v. Worthington, F.2d 315 (2d Cir.), cert. denied, 484 U.S. 944 (1987). A "false writing" is merely a false statement inserted into a writing. Cf. Devitt, et al., supra, at 450.

The materiality requirement of the statute may be met if the false statement has "the capacity to impair or pervert the function of a government agency." U.S. v. Lichtenstein, 610 F.2d 1272, 1278 (5th Cir.), cert. denied, 447 U.S. 907 (1980):

> The test of 'materiality' is whether the statement 'has the natural tendency to

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> influence, or was capable of influencing, the decision of the tribunal in making a [particular] determination.' Proof of actual reliance on the statement is not required; the Government need only make a reasonable showing of its potential effects.

U.S. v. Diggs, 613 F.2d 988, 999 (D.C. Cir. 1979), cert. denied, 446 U.S. 982 (1980) (quoting Weinstock v. U.S., 231 F.2d 699, 701-702 (D.C. Cir. 1956). (footnote omitted)).

The false statement, concealment or omission must be made "knowingly and willfully." Typically, courts interpret these two terms as a unitary concept requiring proof that the defendant made the statement deliberately (and not as the result of a mistake or accident), with knowledge that the statement was false, and with "specific intent." See, e.g., U.S. v. Guzman, 781 F.2d at 431; U.S. v. Lichtenstein, 610 F.2d at 1277. Several circuits describe specific intent as follows:

> The statement must have been made with an intent to deceive, a design to induce belief in the falsity or to mislead, but § 1001 does not require an intent to defraud -- that is, the intent to deprive someone of something by means of deceit.

United States v. Lichtenstein, 610 F.2d 1272, (5th Cir. 1980). See also U.S. v. Corsino, 812 F.2d 26, 29 (1st Cir. 1987); U.S. v. Martin, 772 F.2d 1442 (8th Cir. 1985).

Despite the specific intent requirement, some courts have allowed the "knowingly and willfully" element of the clause to be satisfied by proof that the defendant acted "with reckless disregard of the truthfulness of the statement and with the conscious purpose to avoid learning the truthfulness of the statement." U.S. v. Evans, 559 F.2d 244, 247 (5th Cir. 1977). See

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also, U.S. v. Hanlon, 548 F.2d 1096, 1100-01 (2d Cir. 1977); United States v. Lange, 528 F.2d 1280, 1288 (5th Cir. 1976).

Given the constraints the Independent Counsel statute imposes on the proof upon which I may rely for "state of mind" findings, in conducting my investigation I examined the words and deeds of individuals and was prepared to infer wrongful intent as suggested by events unless "clear and convincing evidence" demonstrated otherwise.

After having carefully studied all of the information I have assembled, as analyzed and discussed in the body of this Report, I conclude that in each instance, the evidence is indeed clear and convincing that the requisite intent to obstruct the Drogoul prosecution was lacking on the part of those involved or against whom interference has been charged. In fact, I have found that there is no credible evidence to suggest otherwise.

In all other instances, including those that have received the highest scrutiny by the public and Congress, I have found no credible evidence that any person in the DOJ or the USAO acted with the requisite intent to obstruct the due administration of justice in connection with a judicial, Congressional or any other proceeding, or to make any false statements to any department or agency of the United States. Absent any credible evidence, the "clear and convincing evidence" necessary to overcome the presumed intent under 28 U.S.C. § 592(a)(B)(ii) is clearly met. Although not within the scope of my inquiry, my investigation does suggest that with respect to the conduct of Mr. Kloske, a possible exception may exist, and the Attorney General may wish to consider further investigation.

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II. ANALYSIS UNDER THE INDEPENDENT COUNSEL STATUTE

As noted above, the Boren Committee and the House and Senate Judiciary Committee letters of October 1992 allege essentially that attorneys at DOJ and representatives of the CIA made misleading statements to, and withheld relevant information from, Judge Shoob and the USAO regarding certain intelligence information on the BNL matter in September 1992.[99] I address this broad allegation in the following analysis that is governed by the Independent Counsel Statute.

First, I consider whether the DOJ or the CIA withheld relevant intelligence information from the USAO in order to obstruct the BNL prosecution. Second, I analyze whether misrepresentations were made to Judge Shoob in the USAO's Sentencing Memorandum dated September 11, 1992, or in Arthur Wade's testimony at the sentencing hearing. Third, I assess whether the DOJ's release of the September 17 letter, and the DOJ's decision not to issue the CIA's September 18 statement, were designed to mislead the Court and the public, and obstruct justice. Fourth, I discuss the DIA's September 17 letter and the Brill public statement on September 21.

A. Was Any Intelligence Information Withheld From The USAO?

I conclude, based on my investigation of all the facts set forth above, that no intelligence information was deliberately

[99]During my investigation, I found nothing tht suggested that DOJ or CIA representatives had withheld information regarding U. S. intelligence agencies and their involvement in, or contemporaneous knowledge of, BNL-Atlanta's unlawful conduct. As a result, my analysis focuses on intelligence information regarding whether "BNL-Rome knew."

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withheld from the USAO by the DOJ or CIA to obstruct the BNL prosecution. Although the USAO did not receive certain intelligence information before the Drogoul sentencing hearing (e.g., the 31 January 1990 [redacted] letter and the CIA Summary), that was the result of inadequate procedures at the CIA for tracing, analyzing, and disseminating such information.

1. DOJ Provided Full Access to Information

There is really no dispute that the USAO had complete access to intelligence information gathered by the DOJ. As early as December 1990, Clark's memorandum to McKenzie invited her to review information that DOJ was gathering on the USAO's behalf. (OIC Ex. 29.) Members of the USAO or its Task Force reviewed the documents at DOJ on at least three occasions: in December 1990 or January 1991 by Agent Wade; on September 13, 1991 by Agents Wade and Horton; and on April 30, 1992 by McKenzie, Chartash, and Agent Wade, at which time they were given an index to all the intelligence reports on file at the DOJ.

McKenzie viewed the USAO's access to the intelligence documents at DOJ as an "open invitation," and Clark believed that McKenzie had ample opportunity to review all intelligence information. (McKenzie Tr. 57.) There is no evidence that DOJ ever denied the USAO access to this information, or withheld any documents from the USAO.[91]

[91]Although the USAO was not permitted to take copies of CIA cables to Atlanta, that restriction is common for such materials, and it does not imply that the USAO was denied access. Similarly, NSA and NSC documents were not concealed or withheld from the USAO, but because the field prosecutors in the USAO lacked the appropriate clearances to review such documents, it had to rely on oral briefings from the DOJ on those materials.

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It is true that the DOJ assumed responsibility for requesting, reviewing, and analyzing intelligence information on behalf of the USAO in this case. But that does not suggest that DOJ attorneys were withholding or concealing that information. To the contrary, the DOJ requests for information to the Intelligence Community were comprehensive and broader than the requests suggested by the USAO, and Greenberg and Clark proceeded to review and follow up on most, if not all, of the information they received.[92] Similarly, when Meltzer sought intelligence information by sending out the DOJ's September 1, 1992 letters, she was doing so to help the USAO pursue leads from the Drogoul debriefings, and she promptly provided all the responses to McKenzie in Atlanta. Although the gathering and assessment of intelligence information by DOJ attorneys was not as thorough as it should have been, which I consider below, it did not reveal any effort to influence improperly or obstruct the BNL investigation.

[92]While the Clark and Greenberg letters to the Intelligence Community never asked specifically whether "BNL-Rome knew," both believed that their broad requests called for, and actually obtained, such information. Nonetheless, the failure of anyone to ask this specific question of the Intelligence Community is curious, given the importance of this issue in the case at that time and the heated debate between DOJ and the USAO. I received given no satisfactory explanation for the failure to ask this question.

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2. Inadequate Procedures at DOJ for Requesting and Reviewing Intelligence Information

Even though I conclude that the USAO was permitted full access to intelligence materials obtained by the DOJ, I am disturbed by the confusion and carelessness that characterized the manner in which the DOJ and the USAO pursued, reviewed, and analyzed information from the Intelligence Community. These shortcomings ran throughout this matter, and greatly contributed to the events in September 1992.

From the outset, confusion reigned on the subject of who was responsible for handling BNL-related intelligence issues, and this led to a delay of several months in the gathering of these materials. Rukstele, McKenzie and Wade each believed that Clark and Greenberg received this assignment from Urgenson by virtue of DOJ's greater familiarity with, and access to, the Intelligence Community. Urgenson thought that Greenberg and Clark were handling the issue and did not monitor their efforts because of their experience. Greenberg, on the other hand testified that Urgenson told him to hold off on the inquiries. Clark disagreed with everyone, saying that the USAO had failed to carry out this assignment, despite assuring him that "the FBI" would do so.[93] No one here is blameless. Such uncertainty should never occur where experienced prosecutors are dealing with sensitive intelligence matters, and particularly in a major case such as this.

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[93]Clark's alleged reliance on the USAO's purported statement that "the FBI" was handling the intelligence inquiries is curious. Whether or not Rukstele or McKenzie told Clark that the FBI was handling intelligence matters (and they deny making such statements), Clark would know that the FBI was not the appropriate avenue for such inquiries.

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There was a similar shrinking from responsibility with respect to the review, analysis and follow-up on intelligence information after it was gathered by the DOJ. Greenberg assumed that Clark and Urgenson were responsible. Urgenson thought that the matters were being handled by Clark and Greenberg. Clark thought that the USAO ultimately had to perform these tasks, and the USAO again looked to the DOJ as having taken charge.

In this race for cover, I could not find a single person at the DOJ or the USAO who could say with certainty that he or she had reviewed and analyzed every intelligence report, and followed up on those that were most important, at any time during the BNL investigation or prosecution.[96] During October and December 1990, for example, the DOJ received several reports from the Intelligence Community that were significant on their face, including the 12 January 1990 CIA cable [redacted] the 5 October 1989 CIA cable [redacted] and the 12 September 1989 DIA cable (discussing NATO collusion with BNL). Yet there are no records of any analysis or follow-up on these cables, and the recollections of Clark and Greenberg are now sketchy at best. As a result, a strong suspicion emerges that the BNL intelligence information was not fully reviewed or followed up on during the period before the Indictment was returned in this case. [redacted]

In the period after the Indictment, the situation is no better. The USAO and the Task Force admit to only a cursory review

[96]Clark and Greenberg had a general recollection of reviewing and following up on some documents, but both pointed to others as having ultimate responsibility. NSA has stated that Greenberg and Clark's review of NSA materials was never completed.

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of intelligence materials even on April 30, 1992, shortly before the expected trial of Drogoul.[95] Moreover, there is no evidence that Meltzer ever reviewed the cables that had been gathered, even when she was assigned to follow up on intelligence issues in September 1992. I would have expected a far more thorough effort and a clear delineation of responsibility on intelligence information issues.

The events of September 1992 arose largely because the DOJ and the USAO were unaware of what specific intelligence information they had received and reviewed. Had Clark, Greenberg, or anyone else documented their efforts, the DOJ might have recognized that the CIA's answer to Question 8 in the September 17 letter was an incomplete statement, as discussed below. To avoid a repetition of these events in some future case, procedures should be adopted to ensure that careful and thorough analysis and follow-up of all available intelligence is the rule in all investigations.

Moreover, as discussed previously, there were wholly inadequate procedures at DOJ for internal routing of intelligence information regularly disseminated to it by the Intelligence Community. Two cables dated 20 April 1990 and 22 February 1991, which were disseminated by the CIA to the DOJ through normal channels, were never routed to the DOJ Fraud Section or the USAO, even though they related to whether "BNL-Rome knew." These internal routing procedures must be improved immediately so that a respected institution like the DOJ will not again be embarrassed by effectively "losing" valuable intelligence information.

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[95]McKenzie explained that she reviewed the materials more for new investigative leads than for trial.

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3. The CIA Provided Incomplete Information To The DOJ

The CIA did not provide complete intelligence information to the DOJ in the BNL matter, despite broad requests by the DOJ. For example, in the Fall of 1990, the CIA failed to produce the 31 January 1990 letter from CIA's [redacted] to USDA's David Kunkel, even though that letter had transmitted the 6 November Typescript and stated that there was "new" information that BNL-Rome knew of BNL-Atlanta's unlawful activities.[96] Further, the CIA produced several other intelligence cables regarding BNL that were never disseminated in the normal channels outside the CIA.

The CIA also neglected to provide the DOJ with information that it prepared internally after responding to the DOJ's 1990 requests, including the CIA Summary prepared for Representative Gonzalez in October 1991. Finally, the CIA's September 4, 1992 letter was incomplete, because it suggested that the CIA only had "publicly available" information on the subject of whether "BNL-Rome knew," when in fact the CIA had private-source information on the subject.

I do not conclude, however, that the CIA's failure to provide complete information was deliberate, or part of an effort to obstruct the BNL prosecution. Rather, the CIA's failure appears to be based on inadequate procedures for retrieving and producing information to the DOJ generally, and on the CIA's inadequate

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[96]Regrettably, it appears that this letter was also not forwarded by Kunkel to Wade of the USDA's Office of Inspector General, who served on the USAO Task Force. (Wade Tr. 60-61.) Wade did not see this letter until on or about November 1, 1992. (Id.)

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review of its own information by the CIA before sending the September 4 letter.

There is no explanation for the CIA's October 1991 Summary not being forwarded to DOJ when it was produced for Representative Gonzalez, other than carelessness or inadequate procedures. According to a routing slip, a copy of the Summary went to the CIA's Office of General Counsel when it was prepared, and adequate procedures should have ensured that the Summary was passed on to the DOJ pursuant to its earlier requests.[97]

With respect to the CIA's September 4, 1992 letter, David Holmes, the agency's Deputy General Counsel, admitted that the answer to Question 8 was incomplete, and that the CIA's review of the appropriate materials was inadequate. Although Holmes's subordinate, [redacted] stated that he conducted a thorough review of all the materials on file, his testimony is at odds with that of CIA analyst [redacted] and Holmes. [redacted] stated that when [redacted] called her to ask about sources on the subject of whether "BNL-Rome knew," she gave him only her recollection that there were public sources, and said she would have to check her file on private sources. [redacted] recalled that [redacted] did not pursue the matter with her, despite her past involvement in the matter.

Holmes testified that [redacted] had failed to consider the 12 January 1990 CIA cable before drafting the response to Question 8. That cable reported [redacted]

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[97] [redacted] name appeared on the routing list, although he denied ever seeing the Summary until the Gonzalez press release on September 14. If [redacted] did not recieve the Summary in the normal course, that underscores the lack of adequate procedures.

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[redacted] In contrast, [redacted] testified that he reviewed the 12 January 1990 cable in preparation of his response to the September 1, request. [redacted] stated that, based on his reading of the letter and his conversations with Meltzer, the September 1 request sought "institutional knowledge" of BNL-Rome, rather than the knowledge of the mid-level official cited in the cable. [redacted]

No matter whose testimony is accurate, it is clear to me that the September 4, 1992 letter should have received greater care and closer scrutiny by everyone involved, including the CIA supervisors, Holmes and Jameson. The CIA routinely "downstreamed" DOJ information requests to paralegals and junior staff attorneys for a response, and this process may account for the erroneous and inadequate responses submitted here. I am pleased to have been advised that Director Gates has ordered an intensive review of the CIA's procedures for dealing with instances such as the BNL case presented.

B. Were Misrepresentations Made To The Court In the September 1992 Sentencing Memorandum or Wade's Testimony

I conclude, based on my investigation of all the facts set forth above, that there were no false statements made to Judge Shoob by the DOJ and the USAO in their September 11, 1992 Sentencing Memorandum, or any endeavor to obstruct justice by those statements. In particular, the Sentencing Memorandum stated, at page 34, that "no credible evidence has been uncovered that supports [Drogoul's] suspicion that other officers at BNL ... knew of his illegal activities."

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Technically, this statement was correct. All the intelligence information in DOJ's own files at the time on the subject of whether "BNL-Rome knew" was not credible in the view of the DOJ and the USAO because it had been discredited by the USAO's investigation. Further, the cables consisted of hearsay statements inadmissible as "evidence."

However, I find such technical distinctions to be less appropriate than in this case, where there was such a bright focus on whether "BNL-Rome knew." Judge Shoob had raised the issue at the June 2 plea hearing, and made it very clear that the issue would be addressed at the sentencing hearing. The Drogoul debriefings also raised the question as to BNL-Rome's complicity, as did various press articles. Under these circumstances, the Sentencing Memorandum should have candidly stated that there were intelligence reports in the DOJ's possession that suggested that "BNL-Rome knew." If the DOJ and USAO believed that those reports were based on speculation, or raised inferences that had already been rebutted by their investigation, that could have been stated as well.

Brill, McKenzie, and Chartash stated that this statement in the Sentencing Memorandum was drafted by Meltzer, and that they relied on her to address the intelligence information issue. This is a curious reliance, since by this time McKenzie and Chartash had reviewed all the cables on at least one occasion (April 30, 1992), whereas Meltzer, a relative newcomer to the matter, had not seen any cables. Although McKenzie said that Meltzer had consulted with "Justice" during the preparation of this Memorandum, it is unclear

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who that person at DOJ was, because Clark said he was never asked to review the Memorandum.

This pervasive reluctance at the DOJ and the USAO to accept responsibility is very troubling. All of these people had ready access to the pertinent intelligence information, and someone on the prosecution team should have conducted a careful review before a statement on the issue was made to the Court. Alternatively, Clark should have been consulted and included in such a review. Had such a review been made, I am confident that it would have resulted in a Sentencing Memorandum that met a higher and more appropriate standard.

My view that carelessness was prevalent throughout this matter is reinforced by the fact that when Meltzer revieved the September 4 letter, she immediately questioned the CIA's response to Question 8, even without reviewing any cables, as indicated in her September 4 E-Mail to Urgenson. This is not surprising, because the CIA's answer to Question 8 appears to me to be incomplete on its face. However, there is no record that anyone (including Brinkac, who was assigned the task by Meltzer) followed up on this answer before the Sentencing Memorandum was filed. If Meltzer in fact relied on the CIA's answer to Question 8 in drafting her answer, which I suspect she did, then she was clearly negligent.

I recognize that the USAO and Meltzer were under great time pressure to prepare for the sentencing hearing, and had many important tasks to complete other than to deal with just one statement in the Sentencing Memorandum. Mueller and Urgenson have also described how occupied they were on other matters. However, time

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pressures, no matter how severe, cannot excuse statements to the Court that are anything less than full and complete. Meltzer, McKenzie, Brill, and Chartash must accept principal responsibility for their cavalier performance, but Mueller and Urgenson have to share the blame for failing to provide supervision.

With respect to Wade's testimony at the sentencing hearing on September 16 that discusses intelligence information, I conclude that his answers taken as a whole were not inaccurate or misleading. Nor did the USAO fail to excerise its responsibility to ensure accurate testimony. Wade incorrectly stated at first that all the intelligence reports he reviewed "confirmed" the prosecution's theory that BNL-Rome did not know of BNL-Atlanta's "off-book" loans. (Wade Tr. 81.) As noted above, some of the cables that Wade reviewed on their face contradict, rather than confirm this theory, even if they were eventually discredited against the background of the Task Force's investigation. However, after the Court questioned this response, Wade then amended his testimony by noting that there were additional cables that were inconsistent, but that they could be discounted for one reason or another. (Wade Tr. 82-83.) Although this was not the preferable method of providing testimony, it does not rise to the level of a misrepresentation to the Court.

C. Was The Release Of The September 17 Letter, And The Withholding Of The September 18 Statement, Misleading?

I conclude that the CIA's September 17 letter, from Holmes to Brill, standing alone, was incomplete when it was released. However, I have found no evidence that Mueller and

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Urgenson intended to mislead the Court or the public, make a false statement, or obstruct justice. Rather, the clear and convincing evidence shows that the September 17 letter was an ill-advised reaction by Mueller and Urgenson to allegations of a DOJ "cover up."

I also conclude that the September 18 statement was not withheld because of any endeavor to conceal or obstruct by Mueller, and that the DOJ properly concluded that the Summary and the underlying cables should be provided to Judge Shoob for his review.

1. The September 17 CIA Letter

When the September 17 letter was released, the CIA's answer to Question 8 was incomplete. Question 8 asked whether the CIA had "any information that BNL-Rome was aware of the illegal activities engaged in by BNL-Atlanta." (Emphais added.) The CIA's answer stated only that the CIA had "publicly available" information on that subject, and said nothing about the private-source intelligence information in the CIA's and DOJ's possession.

That private source information included the three cables underlying the CIA's October 1991 Summary, all of which suggested on their face that BNL-Rome knew of BNL-Atlanta's unauthorized loans to Iraq. It also included the 12 January 1990 cable [redacted] All of this information should have been included in the answer to Question 8 to make it fully complete[redacted]

Even though the September 17 letter was incomplete when it was released, I find there is clear and convincing evidence that there was no intention to mislead the Court or the public, make a

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false statement, or obstruct justice. Mueller and Urgenson had decided that the September 17 letter would be accompanied by a full explanation from the CIA about the Summary and the cables, and that all these documents would be presented to Judge Shoob for his review. Even though the full CIA explanation never materialized, for reasons discussed below, the fact that the Summary and the underlying cables were presented to Judge Shoob within a few days demonstrates clearly and convincingly an intent to disclose fully all information, and effectively rebuts any suggestion that there was some effort to conceal.

It is true that Mueller and Urgenson did not disclose the 12 January 1990 CIA cable, even though that cable had been in the DOJ's possession since October 2, 1990, and had even been the subject of a note by Urgenson on that date. However, I have searched hard for some indication that Urgenson and Mueller were aware of that cable in mid-September 1992, but have found nothing to support such awareness. As astonishing as it may seem, both of these career prosecutors, who had many years of experience, failed to go back to the files themselves to review all the cables, and never directed anyone else to conduct such a review, before seeking the release of the September 17 letter. While this was certainly negligent under the circumstances, it does not suggest any intent to conceal or deceive.

It is of interest to inquire into whether Mueller and Urgenson had some wrongful motive to conceal information that "BNL-Rome knew," as Representative Gonzalez has suggested. Mueller and Urgenson have both explained that their purpose in seeking a declassified version of the September 4 letter was to correct the

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public misperception that the DOJ had been "covering up" the information in the CIA Summary. In other words, Mueller and Urgenson were not seeking the release of the September 17 letter to support the USAO's theory that Drogoul acted alone. Rather, they were seeking release of the letter to establish that the CIA did not tell the DOJ about the information that Representative Gonzalez said was in the Summary.[98] This was clearly ill-advised, because they should not have been seeking to rely on any statement in this case that could be deemed incomplete. But it does show clearly and convincingly that Mueller's and Urgenson's intention was not to promote the incomplete answer to Question 8 in the September 17 letter.

More fundamentally, it is difficult for me to see any reason why Mueller and Urgenson would intentionally seek the release of an incomplete answer to Question 8. I have found no evidence that their superiors at the DOJ, or any other senior officers in the Executive Branch, tried to influence improperly Mueller and Urgenson in the BNL matter. In fact, I have found, after extensive investigation, that the DOJ and USAO prosecutors acted independently throughout.

Nor have I found any reason why Mueller and Urgenson would be concerned as to whether the answer to Question 8 referred to "publicly available" intelligence information or private source information. Indeed, they had reached the conclusion, after studying the Summary and the underlying cables, that the private

[98]The first paragraph of the September 17 letter is drafted to suggest that it is not conveying any new information, but rather is only confirming that the CIA had given the DOJ certain information in the past.

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source information in the cables was probably favorable to the prosecution. The cables provided no real support for the allegation that "BNL-Rome knew," and strongly suggested that the Analytical Comment B in the Summary was simply wrong if it was read to mean that "BNL-Rome knew." Why then would they have any incentive to conceal this information? Their incentive was just the opposite: they would want to show everything to Judge Shoob in order to rebut Representative Gonzalez's allegation that the CIA Summary was significant evidence that "BNL-Rome knew."

There have been allegations that Urgenson at DOJ gave "strong advice" to Jameson at the CIA not to change the answer to Question 8. Urgenson denied that he gave Jameson such firm advice, and said that he had only told Jameson that any change would require a full explanation. Urgenson also said that he was afraid that any changes to the answers after-the-fact might inspire further charges of a cover-up.

Even if Urgenson did give "strong advice" not to change the letter without an explanation, I find by clear and convincing evidence that his intent was not to mislead or conceal on the issue of whether "BNL-Rome knew," but rather to obtain a declassified version of the information he had received in the past, in order to rebut charges that DOJ had known about and covered up the Summary.

In any event, Urgenson's advice did not sway Holmes and Jameson. They testified that they did not view Urgenson's advice to be an effort to influence them improperly, and they decided to release the letter on their own, without regard to Urgenson's comments. Holmes also testified that he and Jameson did not

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believe at the time that the September 17 letter was inaccurate or misleading.

I must emphasize that I do not in any way countenance the cavalier manner in which the DOJ sought to have this September 17 letter released. No one in the DOJ engaged in the very basic task of determining whether the answer to Question 8 was complete. Rather, Mueller and Urgenson ignored the 12 January 1990 cable in their files and the substance of the CIA's answer to Question 8, thinking that it was secondary to their public relations effort to shift the blame to the CIA. Such conduct is unacceptable.

2. The September 18 Statement

Mueller's decision not to release the CIA's September 18 letter is legitimate given his reasons for believing that the statement could have been misleading, and Holmes's acknowledgement that the statement did not satisfy the purpose for which it was drafted. I find by clear and convincing evidence that there was no intent to obstruct justice or make false statements here.

Specifically, Mueller testified that he was uncomfortable with the words in the CIA September 18 statement that "neither the [CIA] summary nor the [underlying cables] permit the definitive conclusion that BNL-Rome was aware that BNL-Atlanta was engaged in illegal activities." That language suggested to Mueller that these documents permit some conclusion -- although not a "definitive" one -- to be drawn along those lines, when in fact the cables underlying the CIA Summary do not permit such a conclusion. This was a legitimate concern under the circumstances.

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Holmes also testified that the September 18 statement had been modified by the CIA to the point where it no longer addressed its original purpose, which was to respond to Representative Gonzalez's September 14 press release by providing a full explanation of the CIA Summary and the underlying cables. Rather, it amounted to an effort by the CIA to retreat from its answer to Question 8 in its September 4 letter, without fully explaining why. Because Mueller was expecting an entirely different statement from the CIA, it was reasonable for him to reject the document sent to him on September 18.

Regardless of these points, the critical fact is that when Mueller decided not to release the September 18 statement, he decided on that same day to offer the Summary and the underlying cables to Judge Shoob in camera, to ensure that the Court was aware of these documents, and to let him draw whatever inferences he thought were appropriate. He also advised Urgenson to meet with the CIA on Monday, September 21, to try to get a full explanation orally for the Summary and the underlying cables, and also to ensure that these documents could be given promptly to Judge Shoob. I find clear and convincing evidence that Mueller fully intended to disclose all information, and that he lacked the intent to mislead or obstruct.

D. The DIA's September 17 Letter

Although the DIA's September 17 letter has received less attention, I must point out that it was also incomplete. As noted above, the DIA had produced one cable dated 12 September 1989 indicating that BNL-Rome may have known about BNL-Atlanta's

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activities. But that cable was not mentioned in the DIA's September 17 letter, because Berry carefully limited its scope to information gathered since September 1989, and "carved out" all information prior to that time As I noted earlier, such "wordsmithing" is clearly unacceptable, and should be viewed unfavorably. However, I found no evidence suggesting that the DIA's letter was produced this way at the request of anyone at the DOJ, or that this letter was ever released to the Court or the public. Thus, I conclude there was no evidence of an endeavor by DOJ to mislead or obstruct justice.

E. Brill's September 21 Statement

The public statement by Brill on September 21 has also received little notice. I cover it here simply to be as thorough as possible in addressing all DOJ activity that might be questionned. I find by clear and convincing evidence that this statement was not intentionally false or misleading, or an endeavor to obstruct justice. By this time, Brill had studied the Summary and the underlying cables, and had determined that, for several reasons, the cables did not support the allegation that BNL-Rome knew. Her statement was therefore fully supported.

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CONCLUSIONS

Based on all the foregoing, I conclude that:

1. There is no evidence that the DOJ withheld any intelligence information from the USAO. However, there is evidence of inadequate procedures and a careless approach to intelligence information that must be corrected.

2. The statement in the September 11, 1992 Sentencing Memorandum is not incorrect or misleading. However, its method of preparation reflected a lack of due care.

3. The September 17 CIA letter was incomplete, but I find that there is clear and convincing evidence that Mueller and Urgenson lacked the intent to conceal or mislead. There is also clear and convincing evidence that the September 18 CIA statement was not withheld for any improper reason.

4. The DIA's September 17 letter and the Brill September 21 statement do not give rise to any claim of wrongdoing by any DOJ official.

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Phone: (703) 482-7676

5 February 1993

APPROVED FOR RELEASE
DATE: 31-Jan-2011

CIA STATEMENT

Release of BNL-related Report

This morning the Acting Director of Central Intelligence released an unclassified summary of the final report of the investigation by the Office of Inspector General into CIA's handling of BNL-related matters. He also released the Decision Memorandum prepared by former Director Robert M. Gates on the Inspector General's report.

The CIA's Inspector General found no evidence of deliberate withholding of information or wrongdoing by any Agency employee in connection with the BNL case.

As in the case of the report on BNL released on 5 February by the Senate Select Committee on Intelligence (SSCI), the Inspector General's report raises a number of issues about the internal functioning of the Agency and about the relationship between intelligence, the law enforcement agencies, the courts, and the Congress. Work is underway to implement the recommendations in the Inspector General's BNL report approved by former Director Gates.

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19 January 1993

MEMORANDUM FOR: Inspector General

FROM: Director of Central Intelligence

SUBJECT: BNL Investigation

1. I have carefully read the Inspector General's "Report of the Investigation of CIA's Handling of BNL-Related Matters." I have also read the voluminous comments from all affected components and individuals, each of them critical of the Report and citing either IG inaccuracies or misinterpretations, extenuating circumstances with respect to its own actions, and, in some cases, alleging distortions by the investigating team itself. The Report has kindled finger-pointing among affected components and between individuals. Against this turbulent backdrop, I feel compelled to act upon the IG Report, even at the very end of my tenure as DCI, because I commissioned the investigation and many of the events occurred on my watch.

2. I accept the Conclusions and Recommendations sections of the Report, subject to the observations below.

3. Insufficient Coordination Within the Agency (pp.). I accept the characterization and conclusions of the report, particularly with respect to the September 4 and 17 letters to Justice, the Gonzalez Summary, DO Information, and Additional Public Statements. I also accept the basic conclusion that the letters to Agriculture received insufficient review and coordination, although I believe that the Report should have given more weight in addressing the letters to the systemic problem (underscored by the Report with respect to the Gonzalez Summary) of the inadequacy of "normal" DI practices and analytical characterizations when applied in legal or regulatory matters.

4. Bias Against Full Disclosure of Relevant Information (pp.). I agree with the IG. However, CIA's record in this area has been steadily improving, especially with respect to Congressional inquiries and questions. Where there are problems I believe they are due to a variety of factors -- all of which must be addressed and/or performance corrected or improved, including (as the IG notes) concern for sources and methods, lack of adequate document retrieval (also noted by the IG), workload, inadequate coordination and

SUBJECT: BNL Investigation

communication of needs or requirements. Where there is any sign of willful intent not to be fully responsive to Congressional, Court or other official inquiries (subject only to protection of sources and methods), those involved should be disciplined. The IG is right -- CIA must do better in this area.

5. Management Oversight/Inadequate Staff Work (pp.). I accept the overall conclusions of the IG, except that I believe the report does not adequately reflect the efforts by OGC beginning on 16 September to get to Judge Shoob to explain CIA's documents (although given my repeated expressions of interest in getting someone from CIA to Atlanta, I should have been asked to call the Attorney General).

6. Inadequate Congressional Liaison (p.). I agree with the IG, even though OCA's explanation of the countervailing considerations has some merit. A direct approach to Chairman Gonzalez or his senior staff on the Summary, with all the risks, should have been given more serious thought.

7. Systemic Issues (pp.). I agree with the IG.

8. Failure to Meet Professional Standards (p.). See below.

Recommendations

9. The IG has made 10 recommendations. I concur without reservation on all of the first nine. Specifically, as numbered in the Report:

(1) The Executive Director should establish a standing senior group responsible for coordinating, overseeing, and ensuring accountability for developing situations that, in the judgment of any member of the group, merit senior-level, focused attention in order to avoid the manifold problems that surrounded CIA handling of BNL. The current BNL task force should serve as a model.

(2) OCA should prepare and submit as part of the FY 94 legislative program a proposed amendment to the National Security Act of 1947, as amended, that would make clear that no provision of that Act or any other law shall preclude CIA or other parts of the U.S. Intelligence

SUBJECT: BNL Investigation

Community from sharing with Justice, or any other federal law enforcement agency, information acquired or maintained by CIA that is evidence of or relevant to a possible violation of federal law.

(3) The Executive Director should establish a task force to develop guidance, in coordination with Justice, that will clearly define when--if ever, under what circumstances, and the extent to which federal law enforcement agencies may task CIA, within the bounds of law and its responsibilities as a foreign intelligence agency, to collect information relating to potential or ongoing federal criminal investigations and prosecutions. Such guidance should be incorporated in Agency regulations and appropriate training courses. The task force also should determine whether to pursue with Justice and others the question of the need for new legislation in this area.

(4) The Executive Director should establish a task force headed by a senior DI or DO official to make specific proposals for developing working relationships with law enforcement personnel comparable to those shared with defense, foreign policy and other intelligence agency personnel.

(5) All components, but especially OGC, OCA and OPAI, must ensure that any Agency materials or statements destined for Justice, Congress or the Courts be subject to full and thorough coordination within the Agency and be complete and accurate.

(6) All communications to Congress that require analytical input should be tasked formally through appropriate DI management channels.

(7) The Agency, as a rule, should not comment publicly on matters under internal and external investigation. Any exceptions must be approved by the DCI.

(8) All Agency components, but especially the DDI, DDO, General Counsel and D/OCA, must ensure that any characterizations of Agency information produced by their components are accurate and not misleading or subject to misinterpretation.

(9) My previous decisions on the IG inspection of the DO information management system are reaffirmed.

SUBJECT: BNL Investigation

10. The IG's tenth and last recommendation suggests that I should "consider" disciplinary actions against four individuals. I have given this recommendation long and careful thought. In the last fourteen months, I have tried to enhance and encourage accountability, full and forthcoming responses to Congress and strict adherence to procedure and process. I have concurred in every prior IG recommendation for disciplinary measures, referrals to the Department of Justice, and remedial actions. On occasion, my decisions have been more harsh than recommended by the IG. Thus, I have taken most seriously the IG recommendation in this case for unspecified disciplinary measures, which was, after all, pursuant to my own original instruction to the IG.

11. There are mitigating circumstances or differences of view advanced in comments on the Report by virtually everyone who was involved -- OGC, OCA, OPAI, DI, and DO. I find some of the comments persuasive, though not necessarily fully exculpatory. For example,

-- OGC did make a serious effort to get to Judge Shoob beginning on 16 September. Indeed, he rejected one overture for a meeting on 23 September. And, absent a CIPA process, OGC was prohibited from approaching the Judge except through Justice.

-- The DI's approach to drafting its views is an outgrowth of 40 years of supporting policymaking. Terms and style congenial to that purpose are not adequate or appropriate to legal proceedings and are easily subject to misinterpretation, as is apparent from the analytic comment on the Gonzalez Summary.

-- The General Counsel tried for some time prior to September to promote better intra-Agency coordination on BNL, an effort not credited in the IG Report.

-- No supervisor can realistically double-check or independently validate the work of all his or her employees. We must ask if the right bases have been touched, if there has been proper coordination, and if the specialist (lawyer or analyst) is confident of or comfortable with his or her conclusions, but rarely is there time in the real world of decision-making to do more.

SUBJECT: BNL Investigation

-- The Gonzalez Summary did play an important role in the confusion of September, and OGC was unaware of the existence of the analytic comments on the Summary until very late.

-- OGC's explanation of its management of the BNL "account" is reasonable, though in hindsight perhaps the arrangement was inadequate.

12. To conclude, the IG investigation produced no evidence of intentional misconduct or misfeasance, malfeasance, or willful intent not to be responsive. There is no indication from the IG or the many pages of comments that anyone had base motives or was trying to do anything but a good job. Yet, no one in CIA has anything to be proud of in this case. Mistakes clearly were made, and there was carelessness and a number of instances of poor judgment. At the same time, the IG report documents in great detail that the Agency's mishandling of BNL last fall was the result of many factors, especially the lack of an adequate dialogue between CIA and Justice; the lack of procedures to ensure proper Agency handling of this case; flawed performances by many individuals; the failure to surface problems at a high enough level and early enough, which allowed problems to fester and compound one another; and the failure of a number of managers to see this "train wreck" coming prior to late September and to act. It was the aggregate effect and interplay of a variety of systemic, procedural and personal shortcomings that produced the poor results.

13. Thus, I believe it would be unfair to single out a few people in any one component for discipline when there were many contributors and when, as the Report makes very clear, serious procedural and systemic problems played a large role. The individuals involved in all components, and all managers have, I believe, learned important lessons. My approval of all of the IG's other recommendations will, I hope, ensure that these systemic, procedural, and cultural problems will be corrected and, in so doing, ensure an effective CIA response in the future to the new challenge of support to law enforcement.

14. My thanks to the IG and his team for carrying out a tough assignment with a tough deadline. This thorough Report and its recommendations provide a sound basis for remedial action.

SUBJECT: BNL Investigation

15. The IG Report should be shown in its entirety to the two Intelligence Committees, but it must be accompanied by this decision memorandum. The Committees should also be told that component comments also are available for their review.

16. I believe the new DCI or the Acting DCI should release a declassified version of the Conclusions of the Report (not the Executive Summary, which I find inadequate), together with this decision memorandum. Prior to release of the Conclusions, all names and identifying titles should be deleted with component references substituted. I defer to the new DCI or Acting DCI as to the timing of any public release.

Robert M. Gates

cc: DDCI
EXDIR
DDI
DDO
General Counsel
D/OCA
D/PAI

14 January 1993

UNCLASSIFIED SUMMARY[1] OF THE FINAL REPORT

OF THE OFFICE OF INSPECTOR GENERAL INVESTIGATION OF

CIA's HANDLING OF BNL-RELATED MATTERS

SUMMARY

1. On October 7, 1992, in the wake of Congressional concern over CIA's handling of information relating to the Banca Nazionale del Lavoro (BNL) bank scandal, the Director of Central Intelligence (DCI) directed that the Inspector General (IG) undertake on an urgent basis an investigation of CIA's handling of BNL-related matters with respect to the Department of Justice (DoJ), the Federal District Court in Atlanta, Congressional inquiries, and other related matters.[2] The focus of the investigation was to be on CIA, not DoJ or any other governmental entity, and its purpose was to determine the reasons for perceived shortcomings in CIA's responses, to determine whether disciplinary measures are warranted, and to recommend changes in procedures that will prevent a recurrence.

2. Since the August 1989 Federal Bureau of Investigation (FBI) raid on BNL-Atlanta, CIA has provided intelligence regarding BNL to DoJ and the FBI in response to requests for information in connection with their investigation and prosecution of Christopher Drogoul, manager of BNL's branch in Atlanta (BNL-Atlanta). That prosecution involves fraudulent activities directed at federal bank regulators and the headquarters of BNL in Rome (BNL-Rome) in connection with loans made to Iraq. CIA intelligence collection efforts focused primarily on Iraqi procurement efforts abroad, not BNL-Atlanta, although some intelligence was incidentally acquired regarding the Atlanta branch. The intelligence reports that were provided to DoJ and the FBI included information regarding BNL matters that was collected in the course of pursuing CIA's foreign intelligence collection requirements.

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[1] This is a summary of the full classified report on BNL. The text has been shortened considerably and some changes and additions have been made for purposes of clarity.

[2] In addition to the DCI's request for this investigation, he also directed the Inspector General to conduct an inspection of the entire records system of the Agency's Directorate of Operations.

3. No evidence was found in this investigation to indicate that any CIA officer intentionally withheld any information concerning BNL from DoJ, the office of the United States Attorney in Atlanta that was prosecuting the BNL case, or the Federal District Court in Atlanta for the purpose of obstructing or preventing the progress of the BNL-Atlanta prosecution or to protect CIA, its employees, sources, or any foreign officials or governments from being implicated in that prosecution. Although a few reports were not disseminated outside the Agency, the decisions not to disseminate them were based upon routine intelligence judgments and reasonable determinations that the information they contained was marginal or generally reflected information that was not unique but available in the open press at the time.

4. Congressman Henry Gonzalez, Chairman of the House Banking, Finance and Urban Affairs Committee, was given summaries of CIA intelligence reports accompanied by analytical comments that led him to conclude that CIA had information confirming that BNL-Rome knew of illegal lending activity by BNL-Atlanta. In fact, the intelligence reporting on which this analysis was based does not support such a definitive conclusion.

5. During late 1989 and 1990, CIA obtained a limited amount of information that related to the issue of whether BNL-Rome knew during 1988 and 1989 of the activities of BNL-Atlanta that later became the subject of DoJ's investigation and prosecution. Almost all of this information was shared with DoJ as early as October 1990. It appears that some of the information in these CIA reports is based on public media reports, hearsay, or mere conjecture on the part of CIA contacts and sources. All of the information in the reports was not fully evaluated, only reflects what CIA officers were told by others and did not represent Agency conclusions that the information in the reports is accurate. None of the information available to CIA establishes that BNL-Rome did know of the activities of BNL-Atlanta that later became the subject of DoJ's investigation and prosecution. Further, as is clear from Judge Lacey's description of other information that was available to DoJ at the time, much similar information had been obtained from other sources, considered carefully, and discounted by the U.S. Attorney in Atlanta in the course of the DoJ investigation of the BNL matter. Nonetheless, several of the CIA reports clearly contain indications that BNL-Rome may have been aware of BNL-Atlanta's actions.

6. In retrospect, mistakes clearly were made by Agency officers in their handling of events related to the BNL matter, and there was carelessness and a number of instances of poor judgment. CIA's mishandling of its role in the BNL matter last fall was the result of many factors, especially the lack of an adequate dialogue between CIA and Justice; the lack of procedures to ensure proper Agency handling of this case; flawed performances by many individuals; the failure to surface problems at a high enough level and early enough; and the failure of a number of managers to see this "train wreck" coming prior to late

September and to act. It was the aggregate effect and interplay of a variety of systemic, procedural and personal shortcomings that produced the poor results. These shortcomings are described in further detail below.

CONCLUSIONS

INSUFFICIENT COORDINATION WITHIN THE AGENCY

7. Insufficient coordination between Agency components retrieving, interpreting, describing, and sharing information relating to BNL was largely responsible for the allegation that CIA support to DoJ's prosecution in Atlanta was inadequate, obstructionist, or part of some broader conspiracy to suppress information.

a. **September 4 and 17 Letters to DoJ**--These two letters, the first classified and the second unclassified, were written by the Office of General Counsel (OGC) in response to DoJ requests and created the impression, in their responses to Question 8, that CIA information regarding BNL-Rome knowledge of BNL-Atlanta activities was based solely on unclassified media sources. These letters represented a pattern of inadequate coordination within the Agency of statements destined for external sources. OGC cannot document any formal coordination of those letters before they left the Agency. There was some discussion of the substance of the answers in the September 4 letter with officials in CIA's Directorate of Operations (DO) and Directorate of Intelligence (DI). However, the content of the September 17 letter, which was destined for public consumption, was discussed only with DoJ. OGC's failure to coordinate the answers to the September 4 letter, compounded by a more egregious failure when those answers were again not coordinated and were repeated in the September 17 letter, resulted in the release of an incomplete and misleading Agency statement about CIA's knowledge of BNL.

b. **Gonzalez Summary**--As part of a summary of Agency documents, Chairman Gonzalez was provided CIA analytical comments that led him to conclude that CIA had information confirming that BNL-Rome knew of the lending activities of BNL-Atlanta for which Christopher Drogoul was being prosecuted. This summary was an attempt by the Agency to comply with a legitimate Congressional request, and at the same time protect DO operational information. According to a DO officer who worked on the Summary, the DO also wanted to avoid the provision of misleading information to the House. Despite these good intentions, however, a lack of review, absence of central direction and insufficient coordination resulted in a misleading product that prompted widespread public controversy, criticism of the Agency's performance and suspicion of its motives. A number of Agency components--DO, OGC, DI and the Office of Congressional Affairs (OCA) had some involvement in the development of the Gonzalez Summary. However, no central point of coordination was established, and too little substantive

discussion occurred between components regarding the accuracy of the Summary, particularly with regard to the analytical comments that were added by the DI. The comments were not treated as a "finished" DI intelligence product that would have required a higher level of coordination. Normally when such products are intended to go to Congress, they are required to be reviewed by DI management and other DI components. A DI supervisor, who did not recall seeing the analytical comments, was of the opinion that the release of the comments was probably not the best approach in this situation. When the Gonzalez Summary and its analytical comments were returned to the DO, copies were furnished to the DO and OCA. However, there was a failure by the DO and OCA to ensure that OGC saw the document with the analytical comments. Given OGC's well known reporting obligations to DoJ relating to the BNL prosecution, this was a major shortcoming. The result was that DoJ and OGC were caught completely by surprise when the information was made public by Chairman Gonzalez on September 14, 1992. In DoJ's eyes, the CIA, not an individual analyst, had adopted a formal position that appeared to be inconsistent with the premise of the BNL prosecution and with what OGC had advised DoJ previously.

c. **DI and OGC's Letters to Agriculture**--An August 1992 letter from OGC and a declassified January 1990 DI letter, both sent to the Department of Agriculture, created the impression that certain CIA information regarding BNL was based only on unclassified media sources. The OGC letter was emblematic of the insufficient attention to detail and lack of coordination regarding information leaving the Agency that typified the actions of those involved in the BNL matter. While the accounts of those involved in the development of the OGC letter indicate that some degree of discussion did take place in connection with the response, the lack of clarity in their collective recollections indicates a serious lapse in the degree of care that was given at the time to its accuracy. No indication was found that OGC discussed the letter's contents with the DI. The senior OGC officer who signed the letter does not recall the circumstances surrounding the letter and assumed it had been properly coordinated. An OGC attorney who drafted the letter recalls that he contacted the DI to determine the source of the "additional information" cited in the DI's January letter and was told it was the *Financial Times*. However, the DI officer contacted claims that the OGC attorney is mistaken and this discussion could not have occurred since the DI officer was on vacation at the time. The OGC attorney admits to the possibility that he spoke to someone other than the DI officer but does not know who this could have been. The DI analyst who drafted the DI letter says that, if the OGC attorney had raised the matter, he would have been advised that the statement contained in the DI letter regarding information as to BNL-Rome's knowledge of BNL-Atlanta's activities probably was not based solely on press reports. The OGC attorney cannot

recall who else in OGC reviewed the draft of the letter prior to his submitting it for signature. The attorney's immediate supervisor originally did not recall anything about the August letter but now says he was present when the senior OGC officer signed it. Although the January 1990 DI letter was properly coordinated for declassification, it appears the OGC letter to the Department of Agriculture was produced without sufficient attention to the questions it was answering and their significance to the BNL case. Thus, in August 1992, inaccurate statements were made in OGC's letter to Agriculture due to insufficient review and coordination. These errors were later compounded and magnified when OGC developed its response to Question 8 of the September 1 DoJ request.

d. **DO Information**--It is apparent that OGC and DO personnel did not communicate adequately throughout the course of this case in terms of the objectives and potential adverse consequences of responses to requests to review and retrieve operational information. Although in the main there was good documentation of formal requests, there also were instances where communication on substantive issues was too informal and was never recorded. Under the circumstances and requirements that were extant at the time, the DO search would appear adequate. However, given the requirements of civil and criminal litigation made obvious by BNL and other cases, it is now apparent that these standards were not adequate. In response to the first OGC request for BNL information in August 1990, for example, the DO conducted a standard search of what the DO considers its official records system. Although costly and labor intensive, a search of existing electronic messages would have produced additional information from outside that system, which is normally searched in response to internal and external requests. There was no dialogue between OGC and DO personnel at the time of the DoJ requests regarding a requirement to search outside that system. Nor does there appear to have been any attempt to coordinate a search of other data collections, used primarily for operational support, that could possibly have contained related information. (See, also, paragraph 10 below for systemic issues regarding the DO records system.) Two years later, in the midst of a damaging public controversy, these other retrieval possibilities were pursued and extraordinary measures added. Customized full-text searches using several hundred new and revised search terms were made of the existing collection of electronic messages. Over 100 DO personnel were employed in reviewing this output and in searching other data collections, most of which are manual.

e. **Additional Public Statements**--The October 10, 1992, public statement commenting on previous testimony by CIA officials before the SSCI was not properly coordinated and was not consistent with CIA's institutional interests. The Agency would be better served by returning to

a strict policy of not publicly commenting on matters that are under investigation by the Executive, Legislative, or Judicial Branches or in litigation. Agency management must exert greater restraint in submitting to urges to cure the public record and rush to favorable judgments. This is, after all, an intelligence agency, and an internal policy of openness to employees must not blur the wisdom of avoiding word-for-word exchanges with the media on matters where the Agency is handicapped by its inability to place all relevant information in the public domain.

BIAS AGAINST FULL DISCLOSURE OF RELEVANT INFORMATION

8. The Agency has a general bias against disclosing all relevant information in response to legitimate requests from DoJ and other Federal agencies. This was particularly evident in the DO responses to particular requests for information pertaining to certain individuals and firms. In each of these cases, the responses provided, while true, were too restrictive to give the reader an accurate understanding of the nature of the Agency's relationship with the individuals or the extent of its knowledge of the entities. The responses provided to the SSCI on November 5, 1992 concerning some of these same individuals and firms were more thorough and reflective of what should be provided to legitimate requesters. Adopting a policy that all relevant information should be disclosed in response to proper requests from federal authorities, unless there is a legal basis to withhold information and a need to do so, would limit the opportunities for misleading or incomplete responses and provide adequate basis for protecting intelligence sources and methods.

MANAGEMENT OVERSIGHT/INADEQUATE STAFF WORK

9. Insufficient supervision and poor staff work characterized the Agency's handling of BNL issues. Senior managers correctly expected to be kept abreast of significant developments by subordinates. On the other hand, they must also assume final responsibility for the failures of those subordinates, especially when the managers did not make the effort necessary to scrutinize their work properly. Managers and their subordinates at all levels in the components working on BNL-related matters, particularly in OGC, were slow to recognize the inadequacies of the Agency's responses to DoJ and the Atlanta prosecution, and were not sufficiently alert to the growing significance of the BNL case itself. Many commented that BNL was not a major item for them at the time. However, by September 1992, a significant amount of Agency effort, Congressional interest and media attention had been devoted to Iraqi procurement and the BNL issue for more than a year. Yet, there seems to have been no instance in late summer 1992 when any senior Agency manager saw the need to undertake a complete review of how these matters were being handled.

a. **September 17 Letter to DoJ.** The September 17 letter to DoJ troubled almost everyone who knew about it, but no one was

uncomfortable enough to take corrective action. An OGC supervisor was sufficiently bothered that he expressed his concerns to his supervisor and called DoJ to discuss the answer to Question 8 but did nothing to correct it despite the fact that he was personally aware that similar language was being opposed strongly in the context of a draft public statement for DoJ. Yet, despite their expressed doubts about the wisdom of such an answer, OGC yielded to its interest in satisfying DoJ, citing as further justification a perceived interest in not changing the original mischaracterization that had been made in the September 4 letter. Those involved in the production and review of this letter exercised poor judgment and failed in their responsibility to protect the Agency's credibility.

b. **Poor Communication With Atlanta.** In September and October 1992, OGC failed to exercise sufficient effort to make direct contact with the Atlanta prosecutors and Judge Shoob in order to clarify the Agency documents the Court had received. It was obvious to all concerned that the prosecutors and the Judge were having difficulty interpreting the Agency's information and harmonizing it with the theory of the prosecution. Yet, after initiating dialogue with other Agency components regarding the need for a trip to Atlanta and being directed by the DCI to make the trip, OGC management failed to follow through and ensure that there was no confusion as to the meaning of the Agency's materials. Although OGC attorneys made several efforts to include a CIPA proceeding as part of the Drogoul sentencing hearing, these efforts were inadequate. The law requires that only DoJ may represent the U.S. in litigation in which the U.S. or a federal agency is a party and it is not suggested that OGC should have approached the Judge unilaterally. However, under the circumstances, it was incumbent on OGC to take whatever steps necessary, including seeking a call from the DCI to the Attorney General, to ensure that Judge Shoob was briefed on the CIA information. This is especially so because OGC had sent out the incomplete September 17 letter based on the rationale that the answers would be explained to Judge Shoob. Once that unclassified letter went out in the form that it did, it was absolutely essential that Judge Shoob have the benefit of the Agency's explanation of it as soon as he received it and the Agency documents. Otherwise the Agency's credibility would clearly be called into question, as in fact happened. OGC management also failed to ensure a rapid response to written queries from the Court and Acting U.S. Attorney for explication of CIA documents or to provide any explanation to the Court after the Drogoul plea was withdrawn. While it may be argued that further efforts by OGC were not requested or favored by DoJ or the U.S. Attorney's Office, the Agency cannot afford to submit so quickly to the preferences of other agencies when its own interests are at risk.

c. **September 4 Letter to DoJ.** There was a lack of oversight and supervision by OGC managers in the approval and transmittal to DoJ of the answer to Question 8 in the September 4 letter. This answer allowed DoJ and the Court in Atlanta to misconstrue the nature and extent of Agency information. While OGC argues that the extremely narrow answer to Question 8 was appropriate in the context of what was already known to DoJ, the answer simply should not have been sent as written. Such a fine legal perspective does not adequately consider the interests of the Agency in ensuring clarity and precision in official Agency statements and does not excuse the failure of the Agency's legal representatives to protect those interests. Finally, the responses in the letter concerning certain individuals should have been more complete.

d. **Gonzalez Summary.** CIA had good intentions in providing the Summary in the first place. Sufficient care was not taken, however, to ensure that the analytical comments it contained were accurate. Essentially, those analytical comments were overstated by a poor choice of words and were based only on the reports referred by the State Department and not on a review of all relevant CIA reporting. The Summary and the analytical comments that were added were subjected to only cursory review in the DI and OCA before being provided to the Chairman's staff. Considering that the Summary was being provided to the Chairman of a standing House Committee with jurisdiction in the matter, it should have commanded the attention and review accorded by the DI to any significant finished intelligence product. Within OCA, it should have been reviewed by the Director or Deputy Director. Also, the DO and OCA should have ensured that OGC was aware of the analytical comments.

e. **September 21 Meeting At DoJ.** Agency employees at the September 21 meeting effectively countermanded a decision by the Agency's most senior officers in crafting a statement they deemed most appropriate for use by DoJ. Agency officers attending this meeting failed to consult with their superiors and gave the Agency's imprimatur to the public statement to be used by Acting U.S. Attorney Brill in court. The DI analysts present effectively modified the analytical comments that had been provided to Congress without any official acknowledgment, correction, or adjustment within the Agency. While DoJ officials at the meeting did not exert explicit pressure on the analysts to alter their views, the context and setting lent itself to misunderstanding of DoJ's motives. It is unfortunate that experienced Agency attorneys at this meeting did not more forcefully assert Agency interests.

f. **DI and OGC Letters to Agriculture.** The August 1992 OGC letter was not reviewed carefully by OGC management to ensure that it was accurate and that the recipient was not being misled. Similarly, the

DI letter of January 1990 should have been reviewed more carefully by DI management since it contained a substantive intelligence judgment that went beyond mere transmittal language.

g. **Public Statement for DoJ.** The only purpose that could be served by the ill-advised public statement of September 18 that was developed by Agency officials was to soothe DoJ's anger and provide further public support for the flawed September 17 letter. As with the September 17 letter, some Agency officers expressed reservations or outright disagreement with providing DoJ such a statement. OCA went out of its way to express concern with misleading statements in the early OGC drafts. The DO in particular opposed such a statement and, according to DO officers, even voiced objections to the DCI. The DI expressed strong reservations to OGC. The most senior officers, up to and including the DCI, expressed concern and added cautionary language to the drafts of the statement. Despite this significant high-level attention, however, no one brought sufficient weight to the discussions to prevent transmittal of a statement to DoJ.

INADEQUATE CONGRESSIONAL LIAISON

10. When Chairman Gonzalez questioned CIA's cooperation with DoJ in his September 14, 1992 press statement, there was no attempt by OCA to meet with him to clarify the Agency's position. An OCA officer recalled that OCA probably did not do this because of the BNL litigation and the fact that the Attorney General had barred all government agencies from providing additional classified information to Chairman Gonzalez because of his actions. This explanation begs the question. OCA should have raised with senior Agency managers the possibility of a meeting with Chairman Gonzalez. At the very least, consideration should have been given to talking to Chairman Gonzalez's senior staffer about the Chairman's interpretation of the summary. It is by no means certain that additional classified information would have been required to be disclosed to the Chairman in explaining the purport of that already in his possession. OCA's role is to make every effort to ensure that congressional leaders, even those in non-intelligence oversight positions or with whom the Agency might have institutional differences, are not misinformed about Agency involvement in issues of significant congressional concern.

SYSTEMIC ISSUES

11. **Information Retrieval.** The Agency's information retrieval systems, including both manual and ADP components, clearly are inconsistent with a variety of current requirements and must be improved. In order to maintain internal compartmentation, records have been intentionally fragmented. The result is a system that was never designed to facilitate external requests that depend upon complete divulgence of all information in the Agency's possession

regarding individuals or entities that may be of little or no operational intelligence interest to CIA. Some DO employees point out that the system also was not designed to facilitate internal requests of such a nature. The DO component that is the official custodian and retriever of DO operational records still does not have complete knowledge of and unilateral access to all DO records systems, making it impossible at this time for searchers to say with complete certainty that all information on a given subject has been found. Coordination among components involved in records reviews is seriously deficient. As late as August 1992, the key Agency components handling BNL matters were unaware of who was retrieving what, when, why, and for whom. Only late in the crisis that developed regarding BNL information were an Agency focal point officer and a central data base established.

12. **Relationships with Law Enforcement Issues.** The U.S. Intelligence Community and the U.S. Law Enforcement Community have developed in very different ways, under starkly different pressures, to respond to unique missions and objectives. *Intelligence* as gathered by CIA is often of hearsay-quality and comes from sources of varying degrees of reliability, can often never be verified and is rarely subject to public scrutiny. *Evidence* developed in criminal investigations, by contrast, is usually obtained from direct sources under threat of perjury or false statement prosecutions themselves and subject to the galvanizing test of public trial and cross-examination. Yet the two communities, driven by the increasing intertwining of domestic and international interests, are moving inexorably toward one another. Some accommodations have been made on each side, yet the two have failed to address adequately the fundamental distinctions in their practices, procedures and cultures. The less than complete response of the CIA to DoJ's BNL prosecution demonstrates the need for significant clarifications regarding the rules of crimes reporting and support to law enforcement by the intelligence agencies; better definition of the problems of law enforcement tasking and the protection of intelligence sources and methods within the parameters of criminal or civil proceedings; and the development of a strategy for overall improvements in CIA's cooperation with law enforcement investigations.

13. DO officers are understandably cautious since there exist broad strictures regarding their authority to collect information for U.S. law enforcement purposes, and on reporting on the activities of U.S. persons. Law enforcement officers and prosecutors are rightly apprehensive about the potential impact of unverified intelligence information and its attendant national security classification on the viability of their cases and investigations. Initiatives in this area must come from the Agency's top leadership, but ultimately the working levels of these agencies must be imbued by that leadership with a stronger sense of the requirement that they work together more cooperatively.

14. The Agency does not have sufficiently strong and direct working relationships between Agency operations and analytic personnel, on the one

hand, and law enforcement and prosecutive personnel, on the other. These should go beyond the existing relations that are focused on and through OGC. A model for such relationships exists in the continuous dialogue that Agency analytic personnel have with personnel elsewhere in the intelligence, defense and foreign policy agencies. The BCCI experience has led to an effort to develop such relationships with federal banking authorities.

15. **Degree of Senior Management Attentiveness.** No senior Agency manager paid sufficient attention to the developing crisis relating to the BNL matter. There were sufficient danger signals to indicate that someone should have seized responsibility for ensuring that Agency actions were well coordinated and fully considered.

FAILURE TO MEET PROFESSIONAL STANDARDS

16. Agency components and employees are expected to meet the highest standards of professionalism in carrying out their functions and duties. Individuals in the following components did not meet these standards in performing their responsibilities and duties with respect to the BNL matter as discussed in this report:

- **OGC**--for failure to ensure the proper supervision and handling of the BNL litigation on behalf of the Agency.

- **DI**--for not properly reviewing Agency information to be provided to a congressional committee and for providing analytical comments that proved to be misleading.

- **OCA**--for failure of senior management to take prompt steps to ensure that proper consideration was given to providing Chairman Gonzalez with a clear understanding of Agency information after he publicly disclosed what he believed CIA's information showed regarding BNL, and for failing to ensure appropriate review and coordination of proposed responses to the Congress and to DoJ.

- **DO**--for failure of senior line management to properly manage records holdings and develop and implement procedures within DO components to ensure full and accurate responses to DoJ inquiries, and for failure to coordinate the analytical comments on the Gonzalez Summary with OGC.

RECOMMENDATIONS

17. This investigation report recommends:

- A senior group be given responsibility for coordinating, overseeing, and ensuring accountability concerning developing situations that merit focused attention by senior managers.

- OCA submit a proposed amendment to existing law that would make it clear that CIA is not precluded from sharing with federal law enforcement agencies information relevant to possible violations of federal law.

- OGC work with DoJ to clarify when federal law enforcement agencies may task CIA to collect information related to federal criminal investigations and prosecutions.

- Establishment of a task force to develop proposals for establishing Agency relationships with law enforcement personnel similar to those that exist with defense, foreign policy, and other intelligence personnel.

- All components be directed to ensure that Agency materials or statements destined for DoJ, Congress, or the courts be fully coordinated within the Agency and be complete and accurate.

- All communications to Congress that require analytical input be tasked formally through appropriate DI management channels.

- The Agency adopt a firm policy of not commenting publicly concerning matters under internal or external investigation or in litigation.

- OGC, DI, and DO be directed to ensure that any characterizations of Agency information produced by their components are accurate and not misleading.

- Creation of a new DO information management system that will ensure timely searches for and retrieval of all information on a given subject.

- Consideration of appropriate disciplinary actions.